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IN THE
SUPREME COURT OF THE UNITED STATES

CONNOR BLAINE, THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Petitioners

v.

MICHAEL PIERCE

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

1. Where a capital defendant has consistently been held competent to make his own decisions, and has consistently declined to challenge his sentence on "mental illness" grounds, may a federal habeas court ignore the state court rulings, disregard the defendant's litigation choices, and instead, solely on request of appointed counsel, order the defendant's indefinite, involuntary commitment for psychiatric "evaluation" – without ever even notifying the defendant, hearing from him, or providing him a lawyer to represent his interest in not being committed?

(Implicitly answered in the affirmative by the United States Court of Appeals for the Third Circuit, in conflict with this Court's precedent.)

2. May federal courts permanently preclude appellate review of such an order by ruling that the long-term involuntary commitment of a competent capital defendant, without even notice and hearing to the defendant, is not "important" and therefore can never qualify as an appealable "collateral order?"

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit, in conflict with other circuit law.)

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I. The federal habeas court's order, mandating the "long-term" involuntary commitment of a capital defendant to a psychiatric facility, violates this Court's standards for such commitments and for habeas review of state court competency determinations.

II. Federal courts cannot permanently preclude appellate review of a '*Vitek*" psychiatric commitment order by ruling that the long-term involuntary commitment of a competent capital defendant, without even notice and hearing to the defendant, is not "important" and therefore can never qualify as an appealable "collateral order."

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ORDERS AND OPINIONS BELOW

The United States Court of Appeals for the Third Circuit refused to exercise jurisdiction over the district court's involuntary commitment order, and dismissed the Commonwealth's appeal on the ground that the issue was not "important" enough to qualify under the collateral order doctrine. The court of appeals opinion was issued on October 24, 2006. The opinion is reported at 467 F.3d 362 (3d Cir. 2006), and is reprinted in the Appendix at App. 1-23.

The October 3, 2004, memorandum and order of the federal district court is reprinted in the Appendix at App. 27-28. The December 18, 2004, federal district court order denying reconsideration is reprinted in the Appendix at App. 24-26.

STATEMENT OF JURISDICTION

This is a federal habeas corpus proceeding brought by a criminal defendant convicted of murder in state court. Petitioners seek review of the order of the United States Court of Appeals of the Third Circuit dismissing petitioners' appeal on jurisdictional grounds. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, which provides, in relevant part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2254(e)(1), which provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State Court, a determination of a factual issue made by a State Court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

Michael Pierce, a Pennsylvania state prisoner, murdered his parents and grandmother in the early morning hours of July 10, 1989. He had threatened to kill his parents repeatedly during the preceding week, by setting their house on fire as they slept. He made good on his word. He was found competent to stand trial and was convicted of the murders and sentenced to death. Since then he has vigorously challenged his murder conviction and the conduct of his lawyers. But he has maintained throughout the proceedings that he has a right not to be subjected to psychiatric testing, and that he does not want to attack the sentencing determination on mental illness grounds.

Pierce's crime

Pierce had an acrimonious relationship with his parents for many years. Approximately two weeks before his crime, Pierce's parents finally demanded that he move out of their house. Pierce moved into the home of a childhood friend across the street. He repeatedly told the friend that he planned to kill both his parents by setting fire to their home. He described to his friend the various incendiary devices with which he was familiar (N.T. Trial 37, 189, 191, 497, 500, 508-510, 512).

Pierce took some candles and five or six books of matches from a drawer in the friend's home and left, wearing a red flannel shirt and dark jeans (N.T. Trial 190, 514-516, 518-520, 522-524, 526). That night Pierce's sister, who was sleeping in in her parents' home, was awakened by the odor of gasoline. Flames erupted. She managed to escape the house with her father, but he went back inside to rescue his wife and his wife's mother. All three died as a result of the fire (N.T. Trial 38-42, 81-82, 339-341, 371-384).

Two neighbors saw Pierce, dressed in the red flannel shirt and dark jeans, running from the back of his parents' home. Police responding to the fire spotted Pierce, but he fled when he saw them (N.T. Trial 200-208, 261, 264, 265, 300-307, 311). Hours later, Pierce was located in the area and placed under arrest, his clothes smelling of gasoline (N.T. Trial 208-213, 268-273, 294-296, 307-309, 341-344, 622).

Pierce's trial and appeals

The following year, Pierce was tried by a jury, with the Honorable David N. Savitt presiding. At the guilt phase the jury convicted Pierce of first degree murder and related offenses. At the penalty hearing, the jury found two aggravating circumstances.[1] The jury also found that these aggravating circumstances outweighed any mitigating circumstances, and accordingly returned a verdict of death (N.T. Trial 1040-43).

After trial, Pierce's attorney was permitted to withdraw, and Pierce's new lawyer filed a supplemental set of post-trial motions challenging the guilt verdict, the death sentence, and the effectiveness of trial counsel. Among other claims, the new lawyer argued that trial counsel was ineffective for not forcing Pierce to present psychological evidence at the sentencing hearing. Trial counsel testified, however, that she had pursued the subject with Pierce, and that he had refused to follow such a strategy. After a series of evidentiary hearings and argument, Judge Savitt denied post-trial motions on April 3, 1992. App. 93-105. Pierce took a direct appeal to the Supreme Court of Pennsylvania, which affirmed the judgments of sentence. App. 75-92.

Pierce promptly filed a pro se petition for state collateral relief under Pennsylvania's Post Conviction Relief

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[1] Murder in the course of committing another felony (arson) under subsection (d)(6) of Pennsylvania's capital sentencing statute, 42 Pa. C.S.A. § 9711; and creating a grave risk of death to a person other than the murder victims, under subsection (d)(7).

Act (PCRA), 42 Pa. C.S.A. § 9541 *et seq*. New counsel was appointed, and amended the petition. Counsel claimed, *inter alia*, that Pierce should not have been allowed to decide for himself to forego a mental health strategy. The PCRA court (Judge Savitt) held an evidentiary hearing and ruled that Pierce was mentally capable of making a knowing and voluntary decision on the matter. The court denied the PCRA petition on December 9, 1997. App. 64-74.

Pierce filed a notice of collateral appeal to the Pennsylvania Supreme Court and asked the Court for permission to proceed pro se. The matter was remanded to the trial court to consider the request. The trial court appointed a new lawyer who represented Pierce during these proceedings. After a hearing, the trial court ruled that Pierce could properly represent himself, assisted by standby counsel, as he pursued his appeal. App. 58. The state supreme court subsequently affirmed the denial of PCRA relief. App. 29-63.

Pierce's competency

Pierce was represented in the state court proceedings by no less than four separate experienced capital defense lawyers.[2] Some attempted to raise mental health issues. But none of them, or the three psychiatrists who examined him, or the trial judge who observed him over the course of a full decade, ever suggested that he met the demanding standard for incompetency. On the contrary, Pierce was repeatedly found competent to make his own decisions.

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[2] Janis Smarro, Esq.; Earl Kauffman; Esq., Bernard Siegel, Esq.; Jules Epstein, Esq.

Pierce was examined several times before trial by court-appointed psychiatrists. On November 20, 1989, Dr. Eric Becker, M.D., reported "no evidence of a psychotic process. The Subject was oriented to person, place and time. The content of his thoughts were appropriate for the interview ... The Subject is capable of standing trial." App. 106-08.

Several months later, on March 9, 1990, and again on March 15, 1990, Pierce was seen by a different court-appointed psychiatrist, Dr. Pietro Miazzo. Pierce refused a formal evaluation. Dr. Miazzo stated, however, that "[t]he interaction was polite and appropriate and there was no mental illness throughout this brief interview." App. 109-10. Dr. Miazzo further reported that "[t]he Defendant was appropriate throughout this interview and he was appropriately dressed and behaved. The interaction was polite and coherent." App. 111-12.

During pre-trial proceedings, moreover, the trial court specifically found that Pierce was competent to stand trial (N.T. 10/16/90, 20-21). *See also* Docket Entry, *Commmonwealth v. Pierce*, No. 1312-1321, August Term, 1989 (C.P. Phila.), December 8, 1989 ("Competency complete. The defendant is competent.")

Nor did any competency issues arise at trial or on post-trial motions. Pierce did often criticize his lawyers, and he insisted on making many of his own arguments. He was a difficult client. But no one thought that made him

incompetent. Indeed, he was entirely lucid, and even articulate. *See, e.g.*, N.T. Trial 356-65; N.T. 10/22/91, 3-77.[3]

Pierce's objection to a mental illness strategy was again at issue on state collateral review. The PCRA court once again convened a number of hearings on the subject. At these hearings petitioner's own lawyer, who had wanted to raise mental health issues, stated his view that Pierce "is an intelligent man" and acknowledged the conclusion that "he certainly is competent to assist in his defense and to stand trial" (N.T. 7/30/97, 5-6, 30).

Despite his own opinions about strategy, moreover, Pierce's collateral counsel dutifully reported to the court that Pierce had cogent reasons for rejecting a mental illness mitigation claim. Counsel explained that Pierce did not want to volunteer to die; he just wanted his lawyers to concentrate on guilt rather than sentencing. He maintained his innocence, and he believed that his chances for a new trial were better if the appeal proceeded as a capital case than if it were a non-capital case. *Id.* At that point Judge Savitt cautioned Pierce, twice, that in his opinion the likelihood of a new trial was small. Pierce responded that he understood the court's view,

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[3] [W]hen I brought up the fact that I wanted [my trial attorney] put up for ineffective counsel, [new counsel] sneered at that like it was a joke when I was talking to him up in the room up there. This is not the kind of man I want representing me. I have very little faith in lawyers as it is now. I don't need someone like that representing me. He is supposed to represent me to do what I want, not what he wants.

N.T. 4/3/91, 6.

but that he thought he had a decent chance, especially on federal review (N.T. 7/30/97, 12-20).[4]

The PCRA hearing produced even more evidence of competence – in the form of the defense's own expert. PCRA counsel retained and brought to the hearing a psychiatrist, who was allowed to meet privately with Pierce. While the meeting was brief, the defense expert felt sufficiently confident to report to the court that Pierce "does appear capable of understanding what's going on today and making decisions," regardless of any underlying mental health concerns (N.T. 7/30/97, 40, 48-50).

Accordingly, the PCRA court stated for the record that "his competency has been determined several times,"

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[4] In fact, consistent with Pierce's belief, federal courts in Pennsylvania have overturned virtually every Pennsylvania capital case they have finally resolved. Some of these decisions provided only sentencing relief, but many granted new trials, at a rate much higher than that in non-capital cases. *See, e.g., Laird v. Horn*, 414 F.3d 419 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 1143 (2006; *Jacobs v. Horn*, 395 F.3d 92 (3d Cir.), *cert. denied*, 126 S. Ct. 479 (2005); *Hardcastle v. Horn*, 368 F.3d 246 (3d Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005); *Holloway v. Horn*, 355 F.3d 707 (3d Cir.), *cert. denied*, 543 U.S. 976 (2004); *Appel v. Horn*, 250 F.3d 203 (3d Cir. 2001); *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997), *cert. denied*, 522 U.S. 1109 (1998); *Wilson v. Beard*, No. 05-CV-2667, 2006 WL 2346277 (E.D. Pa. Aug. 9, 2006); *Baker v. Horn*, 383 F. Supp. 2d 720 (E.D. Pa. 2005); *Simmons v. Beard*, 356 F. Supp. 2d 548 (W.D. Pa. 2005); *Wallace v. Price*, 265 F. Supp. 2d 545 (W.D. Pa. 2003).

that "there's nothing that I can see that changes" that, and that Pierce was making a knowing, intelligent, and voluntary decision about the litigation of his case (N.T. 7/30/97, 28, 38, 51).

And there was yet a later state court proceeding bearing on competency – when Pierce sought self-representation on his collateral appeal. Judge Savitt held yet another hearing. By now Pierce was represented by yet another lawyer; and that lawyer, as with prior counsel, stated on the record that he had explained the proceedings to Pierce, and that Pierce was fully capable of understanding them (N.T. 11/10/99, 539-40).[5] After colloquying the defendant, including a warning on the need for a lawyer, the court accepted Pierce's competence and granted the pro se request (N.T. 11/10/99, 540-47).

Pierce's federal habeas proceedings

After the Pennsylvania Supreme Court affirmed the denial of state collateral relief in 2001, Pierce promptly filed a pro se Petition for Writ of Habeas Corpus in federal district

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[5] As Pierce remarked at the hearing,

> I'm just trying to get these issues raised, and once I get these issues raised, we can get this thing rolling. If the State believes I should die, then they will get their wish if there is no merit; and if there is merit, I'll get my wish and I'll have my issues and argue and then I'll get the relief I think I deserve, which is to be released from prison.

N.T. 11/10/99, 546-47.

court on January 31, 2002. The district court appointed the federally-funded Capital Habeas Corpus Unit of the Defender Association of Philadelphia to represent Pierce. App. 115-16.

Pierce moved for removal of counsel, explaining, *inter alia*, that the organization had given him bad advice in the past, and that he did not trust them. Motion for Removal of Court Appointed Counsel, filed March 21, 2002. Without hearing from counsel, the court denied the motion. Pierce renewed it; the court denied it again. App. 117-19.

Habeas counsel were thus alerted that Pierce might not see eye to eye with them about how to litigate his petition. Instead of proceeding openly in court to resolve the matter, however, as the state lawyers had done, habeas counsel chose a different course. They filed an *ex parte* motion seeking an order compelling state officials to transfer Pierce out of prison to the University of Pittsburgh Medical Center, where he would undergo an MRI procedure and a PET scan of his brain. This would achieve exactly the kind of intrusive examination that Pierce had been resisting for the previous twelve years.

Without ever advising the Commonwealth (or, apparently, habeas counsel's own client) of the existence of the motion, the district court granted it. The court's order specifically provided that it must be kept secret from "any person affiliated with the District Attorney of Philadelphia County" (App. 121-22) – which is counsel for all respondents in this habeas proceeding.

The secrecy plan was foiled, however, by an apparent administrative error: the court clerk's office, perhaps without

having read the order carefully, mailed a copy to counsel for respondents. The Commonwealth then filed a motion for reconsideration. Once the order was exposed and challenged, the district court vacated it. App. 122-23.

Habeas counsel responded with a slight shift in tactics. They filed a motion seeking to commit Pierce involuntarily to a prison psychiatric facility. As the basis for this motion they referred primarily to new statements they had secured from four mental health professionals. Two of these had never met Pierce and never read the state court record; one met him but pretended to be a medical doctor performing simply a physical exam; and the fourth was the defense expert at the 1997 state collateral review hearing, who flip-flopped after being contacted by habeas counsel. The gist of these statements was that Pierce has been crazy for years, and must therefore be subjected to a competency evaluation. Petition for Involuntary Commitment, filed February 10, 2003.

In response, the Commonwealth pointed out that the motion essentially sought to reverse the multiple state court determinations that Pierce was competent, and that he therefore had a right to refuse an evaluation and make his own decisions about the litigation. The Commonwealth argued that the district court could not properly address the competency issue de novo, or without representation of Pierce's interests, which he obviously believed to be at odds with those of his ostensible attorneys.

The district court dismissed these concerns in a one-and-a-half page memorandum. The court concluded that it would not be "helpful" to inquire into Pierce's wishes, because he "might" be incompetent. The court therefore

granted the order compelling Pennsylvania prison officials to commit Pierce involuntarily. App. 27-28.[6]

Despite the asserted competency premise, moreover, the court's order actually went significantly beyond that issue, explicitly requiring that the psychiatric evaluation "include an assessment of Petitioner's current competency to rationally assist counsel, *as well as determine* whether Petitioner suffers from Paranoid Schizophrenia *or any other mental illness*" (emphasis supplied). In a stroke, then, the order effectively overrode the years of state court litigation holding that Pierce was competent, and that he had properly declined to permit investigation of mental illness claims. The order further specified that the commitment was to be "long-term," with no stated maximum or periodic review process. The court later denied reconsideration, but granted a stay, which remains in effect pending further review. App. 11, 24-25, 129-30.

The Commonwealth appealed under the collateral order doctrine. While the case was pending, Pierce attempted to communicate with the court of appeals by letter. The court sent the letter back, informing Pierce that his handwriting

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[6] During twelve-plus years of incarceration, the prison officials themselves had apparently never found it necessary to commit Pierce to a psychiatric facility. Had they undertaken to do so, they would not have been able to act by fiat, but would instead have been bound by the procedures and protections of the Pennsylvania Mental Health Procedures Act, 50 P.S. § 7101 *et seq.*, and by lengthy departmental regulations. (Available online at http://www.cor.state.pa.us/standards/lib/standards/13.08.01_Access_to_Mental_Health_Care_Binder.pdf)

was too messy to read. The court added that in any case it would not accept any filings from Pierce, as he was represented by counsel. App. 113-14.

The court of appeals issued its decision in the case on October 24, 2006. Ultimately, the court framed its disposition on jurisdictional grounds. The court noted, however, that the jurisdictional issue was inextricably intertwined with the issue of Pierce's mental state. App. 3. Accordingly the court spent the first half of the opinion discussing its view of the history and substance of the competency question. The discussion emphasized numerous aspects of the state court record, and of habeas counsel's federal filings, that the court believed to cast doubt on the previous competency rulings. App. 2-10. The court determined that the petition for involuntary commitment "made a reasonably strong showing that Pierce was acutely mentally ill." App. 10.

As to the commitment order itself, the court concluded that the issue was not "important," because Pierce was already in custody, and the indefinite involuntary transfer to a psychiatric facility would not meaningfully alter the custody.[7] This "importance" conclusion necessarily

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[7] The court deduced that Pierce himself apparently agreed the matter was not important, since he did not file a pro se appeal. App. 20. The opinion does not mention, however, that Pierce was never served with, and apparently never even knew about, the order he was supposed to appeal from.

The court also noted that it had returned the letter Pierce wrote, with a suggestion to him to write more legibly in the future; yet "the Court has not heard from him since." App. 20. The opinion *(continued ...)*

resolved the case on jurisdictional grounds, held the court, because the appeal was under the collateral order doctrine, which requires an order that resolves an "important" question separate from the underlying merits. App. 16-17. Accordingly, the court dismissed the appeal for lack of jurisdiction.

REASONS FOR GRANTING THE WRIT

I. The federal habeas court's order, mandating the "long-term" involuntary commitment of a capital defendant to a psychiatric facility, violates this Court's standards for such commitments and for habeas review of state court competency determinations.

The national debate over the death penalty has distorted many aspects of what would otherwise be uncontroversial neutral principles of law. *See, e.g., Comer v. Schrirro*, 463 F.3d 934 (9th Cir. 2006) (because there is a

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does not note, however, that the court's communication to Pierce stated clearly that the clerk would accept no further pro se filings, since Pierce was represented by counsel. App. 113-14.

The court further concluded that Pierce must have "abandoned" concerns about his appointed attorneys. The opinion acknowledges, however, that Pierce actually moved for replacement of counsel – twice. App. 20. Both motions were summarily denied. The opinion does not say how many more times Pierce should have repeated the request.

qualitative difference between death and any other form of punishment, Eighth Amendment prohibits capital defendant from waiving federal habeas appeal, even where the defendant is fully competent and makes a knowing, intelligent, and voluntary decision), *en banc rehearing granted*, 471 F.3d 1359, *different result reached on rehearing*, 2007 U.S. App. LEXIS 6035 (March 15, 2007). This case presents a disquieting new paradigm in that process.

The state courts here spent over a decade addressing claims that a capital defendant should be forced, against his will, to submit to psychiatric testing in order to challenge his death sentence on mental illness grounds. After numerous hearings and reviews, the courts repeatedly held that the defendant was competent to decide for himself.

Once the case reached federal habeas review, however, the district court granted a secret, *ex parte* order compelling the defendant's transfer from prison to a university hospital for the performance of various scans of his brain. When that plan inadvertently came to light, the court replaced it with an order requiring the defendant's indefinite commitment to a prison psychiatric facility, for "long-term" evaluation not only of his competency, but of any "mental illnesses" he might have, regardless of competency.

On appeal, the court held that such an involuntary commitment is not "important" enough to meet jurisdictional requirements for appealability, because, when all is said and done, the defendant "will be in custody in one place or another" either way. App. 16. The court reasoned that, since the defendant had not filed a pro se appeal, it was appropriate

to conclude that he was not necessarily opposed to counsel's effort to commit him – even though he had spent more than ten years fighting psychiatric testing, had twice, unsuccessfully, petitioned for removal of habeas counsel, had been officially advised by the court itself that it would not accept his pro se filings, and had never been served notice of the commitment order he supposedly welcomes.

This Court has already plowed the ground at issue here. In *Vitek v. Jones*, 445 U.S. 480 (1980), the Court held that a prisoner may not be committed involuntarily to a prison psychiatric facility without notice to the prisoner and an opportunity to respond. In *Demosthenes v. Baal*, 495 U.S. 731 (1990), the Court ruled that state court competency determinations receive a presumption of correctness on federal habeas review, and that an execution may not be delayed merely because the habeas court has a different view of the state court record, or has before it new allegations by defense experts.[8] In *Gilmore v. Utah*, 429 U.S. 1012 (1976), and *Whitmore v. Arkansas*, 495 U.S. 149 (1990), the Court established that a competent capital defendant is entitled to make his own decisions about the case, even if others supposedly acting in his interest would litigate it in a different fashion.

Nonetheless, competency claims remain a fertile basis for expansive capital habeas litigation. That is especially true where, as here, the capital client does not agree with the

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[8] *See also* 28 U.S.C. § 2254(e)(1) (in habeas proceeding, state court factual determinations presumed correct; applicant has burden of rebuttal by clear and convincing evidence).

litigation goals of capital defense counsel. *See, e.g., Michael v. Horn*, 459 F.3d 411 (3rd Cir. 2006) (remanding for new competency hearing on basis of letter from defense expert suggesting defendant might be incompetent, despite repeated objections from defendant who had consistently been ruled competent), *cert. denied*, 2007 U.S. LEXIS 2796 (February 26, 2007); *In re Heidnik*, 112 F.3d 105 (3rd Cir. 1997) (rejecting state court competency determination – despite fact findings based on extensive expert testimony – because federal court of appeals believed defendant's explanation for waiving review was not sufficiently "rational"); *In re Zettlemoyer*, 53 F.3d 24, 27-28 (3rd Cir. 1995) ("I am not crazy, I'm not loony. I understand perfectly what's going on with the execution and everything, and it was my desire, which I expressed to my attorney, to come up here and try to untwist some of the terrible things that Mr. Wiseman [of the Capital Habeas Unit] has gotten up here and twisted. He has taken things out of context. He has twisted the truth.").[9]

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[9] *See generally* White, Defendants Who Elect Execution, 48 U. Pitt. L. Rev. 853 (Spring 1987):

> [One Pennsylvania attorney] who represents many capital defendants ... is well aware that a criminal defense attorney ordinarily has an obligation to respect the goals selected by his client. He says that ordinarily if a client told him to drop an appeal or not to present a particular defense, he would feel bound by his client's wishes. In explaining why the issue of self-execution is different, [the attorney] says that in this situation an overriding principle outweighs the client's interests. According to [the attorney], "The state's goal of killing someone is immoral." Thus, he concludes that his paramount objective is to prevent the state from realizing its

(continued ...)

In that spirit of helping the capital defendant in spite of himself, the district court and court of appeals treated the involuntary commitment as if it were no big deal. They dismissed concerns about the process on the ground that it was just a routine exam, a starting point. Pierce "might," after all, be incompetent (district court memorandum ordering commitment, app. 28); "reasonable people would agree" that he "needs the evaluation" (district court memorandum denying reconsideration, app. 24); and anyway there was no "important" imposition on his liberty, because he was already on death row (court of appeals opinion, app. 16).

But the whole question in this case was why neither the state court judges nor the defendant himself counted as "reasonable people." The district court and court of appeals were certainly entitled to their own reading, selective as it may be, of the existing record and the new filings concerning Pierce's mental state. Under *Vitek* and *Demosthenes*, however, the federal courts were *not* free to decide for themselves, *de novo*, whether Pierce should be forced to undergo evaluation. That was precisely the issue that Pierce had already decided for *him*self, and that the state courts had

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immoral goal.... [B]ecause of his overriding opposition to capital punishment, [he] will not yield to his client's wishes....

Other capital defense attorneys are not as outspoken ... and, when pressed, some of them acknowledge the ethical problems inherent in opposing a client's wishes. Nevertheless, of the attorneys with whom I spoke, not one indicated that he could imagine a case in which he would voluntarily allow a capital defendant to submit to execution.

already decided he was competent to decide for himself. Those constraints on the habeas courts' power should have been the threshold question, not an afterthought. Instead the courts acted as if there were a presumption of incompetency that made everything previous an irrelevance.

And yet, the notion that the commitment was merely a minor technicality – on the way to a routine competency determination – is belied by the scope of the order itself. Despite the court's stated concern with Pierce's competency, the actual order directed psychiatrists to go well beyond a simple competency evaluation. The order explicitly mandated that the psychiatrists not only make an assessment of competence, but that they then proceed further to determine if Pierce has "any" mental illness. That additional evaluation, in other words, must be performed whether or not Pierce is found to be competent.

Such a commitment order completely sidesteps everything that happened in state court concerning Pierce's decision not to raise mental illness claims. Competency is a narrow legal standard requiring relatively minimal mental capacity. The standard may be readily satisfied, even by individuals who are in some sense impaired.[10] "Mental

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[10] *See, e.g., Battle v. United States*, 419 F.3d 1292 (11th Cir. 2005) (capital defendant competent to stand trial despite signs of mental illness, which included testimony from defense experts that he was paranoid schizophrenic, plus evidence that defendant made frequent outbursts and complaints about his lawyers, and believed prison guards had implanted microchips in his body; while trial counsel now claims he was incompetent at trial, claim is unpersuasive since she chose not to raise issue then; trial court *(continued ...)*

illness," on the other hand, is a dramatically broader concept, encompassing problems such as "mood disorders." Pierce has been ordered committed, therefore, not just to (re)establish his basic ability to understand the proceedings, but to generate for his attorneys the kind of psychological stratagems that he does not wish to pursue.

This Court's precedent precludes such a discovery expedition through the defendant's mind, even in a capital case. Before imposing an involuntary, indefinite psychiatric commitment, the habeas court was first required to confront the rulings of the state court and the rights of the presumptively competent defendant. Yet the district court here never addressed the presumption of correctness, never considered exhaustion, never gave notice to Pierce, never provided him any kind of representation, never even laid eyes on him. The court of appeals, rather than correct the process, held Pierce responsible for the outcome, though his pleas for new counsel had been refused and his pro se efforts had been rejected.

Understandably, capital cases present special difficulties in the handling of competency issues. An involuntary psychiatric commitment, however, is not a casual first step. This Court's review is necessary to resolve the competing interests.

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interacted with defendant daily and found his conduct to be rational).

II. Federal courts cannot permanently preclude appellate review of a '*Vitek*" psychiatric commitment order by ruling that the long-term involuntary commitment of a competent capital defendant, without even notice and hearing to the defendant, is not "important" and therefore can never qualify as an appealable "collateral order."

The court of appeals held that "[t]here is nothing 'important,' as that term is understood in *Cohen* [*v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)], about the issue raised in this appeal." App. 16. Therefore, concluded the court, the involuntary commitment order at stake did not satisfy the collateral order doctrine established by *Cohen*, and the appeal could be dismissed.

That ruling put the court of appeals at odds with the overwhelming weight of circuit authority, which has held that involuntary commitment orders are indeed appealable under the collateral order doctrine. *See, e.g., United States v. Deters*, 143 F.3d 577 (10th Cir. 1998); *United States v. Rinaldi*, 351 F.3d 285 (7th Cir. 2003); *United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996); *United States v. Weisberger*, 951 F.2d 392 (D.C. Cir. 1991).

The court of appeals attempted to distinguish this line of authority; the effort, however, leaves the court in conflict not only with the other circuits, but with this Court's precedent as well. The court of appeals took the position that involuntary commitment is appealable only if the subject of the commitment order is not at the time under any other form of custody. If, on the other hand, he is in prison, then he has no recourse for challenging commitment: he "will be in custody in one place or another." App. 15-16. There is, in

the court of appeals' view, no important distinction, and therefore no importance under the collateral order doctrine.

That rationale simply cannot be reconciled with this Court's ruling in *Vitek v. Jones*. The central premise of *Vitek* is that prison and involuntary commitment are not the same thing. "The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement." 445 U.S. at 492. The "consequences visited on the [committed] prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of a crime." *Id.* at 493.

The court of appeals here never considered this reasoning; it merely dismissed *Vitek* as "not particularly instructive because it is not a collateral order doctrine case." App. 17. No; but *Vitek* nonetheless negates entirely the court of appeals' logic. *See United States v. Visinaiz*, 96 Fed. Appx. 594, 597 (10th Cir. 2004) (unpublished) (order committing prisoner to mental hospital is appealable under collateral order doctrine even though he is already in custody; *Vitek* makes clear that "a significant difference exists between the two types of detainment").[11]

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[11] In addition to the *Cohen v. Beneficial* "importance" issue, which comprised the large part of its appealability discussion, the court of appeals also briefly touched on *Cohen*'s requirement that the order in question be "separate" from the underlying merits of the case. The court concluded that the order here was not separate, because habeas counsel intend to seek ultimate relief on the ground that Pierce was not competent to stand trial. App. 14-15.

The order on appeal, however, is not a determination of competency. The order on appeal is the district court's mandate *(continued ...)*

Perhaps the court of appeals would not have brushed *Vitek* aside so easily if this were not a capital case. In rejecting appealability, the court made special reference to the fact that "Pierce is in custody as a death row inmate." App. 16. The point was no doubt prompted by habeas counsel, who argued that death row custody is highly restrictive, that a prisoner would feel less confined on a psychiatric ward, and that the commitment order was therefore of insufficient "importance" under the collateral order doctrine. Letter Addressing Jurisdiction, March 16, 2004, 13-15.

But this purported preference for commitment over death row was not for the court of appeals to exercise. Pierce was the one committed for evaluation, and Pierce had made it abundantly clear in state court that he did not prefer the role of psychological test subject. He just wanted out, by way of a new trial. The appealability of the commitment order should not have turned on his status as a death row inmate.

Of course it is a truism that "death is different." If, however, there are to be special rules for imposition of or appeal from involuntary commitment orders in capital cases, this Court should be the arbiter. Review is warranted.

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that Pierce be committed indefinitely to a secure psychiatric facility, to be subjected to psychological testing that he has studiously opposed. Appellate review of that order does not require a determination of whether Pierce was competent to stand trial.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 04-9000

MICHAEL PIERCE

v.

CONNER [SIC] BLAINE; THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 02-cv-00513)
Senior District Judge: Hon. Ronald L. Buckwalter

Submitted Under Third Circuit LAR 34.1(a)
September 1, 2006

Before: MCKEE, GREENBERG AND ROTH,
CIRCUIT JUDGES

(Filed: October 24, 2006)

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OPINION OF THE COURT

PER CURIAM

Appellee Michael Pierce, a death-sentenced inmate incarcerated at the State Correctional Institution in Greene County, Pennsylvania ("SCI-Greene"), was convicted in 1990 following a jury trial of three counts of first degree murder, arson and other charges in connection with setting his parents' house on fire. Pierce's mother and 95 year-old grandmother died in the fire, and his father, who tried to save them, died six months later from complications due to smoke inhalation and bronchopneumonia. The fire was started in the basement by use of an accelerant, gasoline. Although an adult, Pierce was living with his parents just before the fire because his marriage had failed and he was unemployed. Pierce's sister, Joan, who escaped the fire, testified for the Commonwealth that Pierce believed that his parents were conspiring against him and trying to poison him.

Pierce's competence to stand trial and unyielding negative views about a psychiatric approach to his defense were issues from the beginning of the criminal proceedings. Our decision that we lack jurisdiction over this appeal requires that we discuss this background in some detail. Prior to the appointment of Janice Smarro, Esquire, Pierce moved to have two prior lawyers discharged on the ground that each was conspiring with the District Attorney of Philadelphia. One of these attorneys, Michael Wallace, Esquire, sought a court-ordered competency evaluation. In November 1989, Dr. Eric Becker did a mental status examination and concluded that Pierce was competent to stand trial. Apparently, the trial court, the Honorable David N. Savitt, found Pierce competent to stand trial in December 1989. App. 64. Wallace tried to have the trial court order other evaluations in 1990, but Pierce refused to cooperate with Dr. Pietro Miazzo, App. 67, 69, and he then sought to have Wallace removed from his case.

Pierce went to trial with Smarro as counsel and was found guilty. At the penalty hearing, the Commonwealth argued two aggravating circumstances, murder in the course of committing another felony (arson) under 42 Pa. Cons. Stat. Ann. § 9711(d)(6), and creating a grave risk of death to a person other than the murder victims under subparagraph (d)(7) of the same statute. In her penalty-phase summation, Smarro raised four mitigating circumstances: that Pierce had no significant prior criminal history, 42 Pa. Cons. Stat. Ann. § 9711(e)(1), that he was under the influence of extreme mental or emotional disturbance at the time of the murders, subparagraph (e)(3), his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, subparagraph (e)(8), and any other mitigating factors under the catchall, subparagraph (e)(8). She implored the jury to consider that Pierce was out of touch with reality and

mentally ill at the time of the offense, but she did not seek to have Pierce evaluated by a mental health professional, nor did she seek a competency evaluation or an inpatient commitment. The jury returned sentences of death for each of the three murder convictions, after finding that the Commonwealth had proved both of the aggravating circumstances. Pierce was sentenced to death.

During post-verdict proceedings in 1991, Pierce's new attorney, Earl Kauffman, Esquire, argued that Smarro was ineffective at the penalty phase for failing to present psychiatric testimony, among other things. Pierce, however, again refused to speak to a psychiatrist, thus undermining new counsel's strategy for appeal. Following hearings, the trial court denied post-verdict motions, holding that Smarro was not ineffective. Psychiatric investigation would have been a futile gesture because of Pierce's refusal to present such evidence. Judge Savitt explained:

> With respect to the issue of psychiatric testimony, trial counsel testified at the July 10, 1991 [hearing] that defendant had told her "in no uncertain terms" that he would not speak to either a psychologist or a psychiatrist. In light of this, obtaining a psychiatric witness would have been a futile gesture. Furthermore, trial counsel did argue that the defendant was under the influence of extreme mental or emotional distress at the time he committed the act based on the testimony of Joan Pierce and Timothy O'Reilly and also that the defendant's capacity to conform his conduct to the requirements of law was substantially impaired also based on testimony at trial.

App. 58-59.

The state supreme court affirmed on July 1, 1994 in Commw. v. Pierce, 645 A.2d 189 (Pa. 1994). In pertinent part, the court held that trial counsel was not ineffective for failing to introduce expert testimony on the issue of Pierce's mental state and the effects of his drug and alcohol abuse, stating that: "[A]n accused cannot refuse to cooperate with counsel in preparation of a particular trial strategy and then argue counsel's ineffectiveness for failing to pursue that course of action." Id. at 196 (citing Commw v. Szuchon, 484 A.2d 1365 (Pa. 1984)). The court explained:

> Appellant argues that trial counsel should have recognized that there was something critically wrong with [his] thought process and forced [him], against his own wishes, to present psychological evidence of emotional and mental disturbance in mitigation at the penalty phase. Trial counsel testified at the hearing on post-trial motions that she requested appellant submit to psychological and psychiatric interviews prior to trial and that appellant vehemently refused to cooperate. In fact at one of the hearings on post-trial motions (hearings were held on four separate dates) appellant testified that he had dismissed his first court appointed attorney over the issue of psychiatric evaluations. Appellant emphatically stated that there was nothing wrong with him and that he would not cooperate with preparation of psychological or psychiatric testimony.

Pierce, 645 A.2d at 196. No petition for certiorari was filed.

Pierce filed a state petition for post-conviction relief pro se in October 1994. Counsel was appointed and an amended petition was filed. The trial court permitted post-conviction counsel, Bernard Siegel, Esquire, to retain a psychologist, and Siegel attempted to have Pierce evaluated

by Allan Tepper, Psy.D., to explore with him potential death penalty mitigation factors and issues, and the issue of his state of mind at the time of the offense. Pierce refused. The trial court convened a hearing on July 30, 1997, and Dr. Tepper was permitted to attend to speak with Pierce about his refusal to be examined. Pierce testified that he did not wish to pursue psychiatric defenses. He noted his high intelligence and asserted that he had certain guilt-phase issues he wished to pursue, including some involving jury instructions. He believed that, with the death sentence in place, his eventual federal habeas appeal would receive greater attention. On the other hand, if the death sentence was vacated, he "could spend 20, 25, 30, 40 years trying to get my appeal heard," and, in any event, he was not afraid to die. App. 193-94, 211.

Dr. Tepper testified that, although Pierce appeared to have underlying psychiatric problems, he understood that he might be giving up a substantial right in not pursuing the mental illness mitigating issues. Moreover, he could listen to what others had to say and voice his opinion. App. 228-230. The state post-conviction petition was denied. Judge Savitt concluded that the issues had been previously litigated, and to the extent that new issues had been raised, Pierce voluntarily and knowingly did not wish to pursue any psychiatric defenses. App. 31-32.

Pierce filed a notice of appeal to the state supreme court and Siegel petitioned to withdraw as counsel. See Commw. v. Pierce, 786 A.2d 203, 211 (Pa. 2001). The request was granted and the trial court appointed Norris Gelman, Esquire, to handle the appeal. Gelman then moved for leave to withdraw as counsel and that request was granted. Id. The trial court then appointed Jules Epstein, Esquire, as Pierce's third post-conviction counsel, but Pierce moved to proceed pro se on his appeal. Id.

Pursuant to the state supreme court's directive, the trial court held a hearing on November 10, 1999, where both Pierce and Epstein were present. App. 536-58. At this hearing, the trial court questioned Pierce to determine whether he knowingly wished to waive his right to counsel and proceed pro se, and the court concluded that he did. Pierce, 786 A.2d at 211-12. Pierce then proceeded pro se on appeal to the state supreme court, with standby counsel to assist him in complying with procedural rules. Id. at 212.

Pierce, when left to his own devices, raised no ineffective assistance of counsel issues concerning a failure to introduce psychiatric testimony in mitigation or on the issue of his mental state at the time of the offense. Instead, he raised a host of layered ineffective assistance of counsel claims that were not previously litigated, id. at 212-13, concerning jury instructions, identification and examination of witnesses, prosecutorial misconduct, pretrial identifications, the medical examiner's testimony, selection of jurors, and a trial exhibit, id. at 213-21, among others. The state supreme court heard these claims on the merits, and affirmed on December 21, 2001, id. at 223.

On January 31, 2002, Pierce filed a pro se petition for writ of habeas corpus under 28 U.S.C. § 2254 and a request for counsel. The District Court appointed the Defender Association of Philadelphia to represent him. About a month later, Pierce filed a motion for removal of court-appointed counsel, and a request either for new counsel or standby counsel, which the District Court denied. Within a week, Pierce again moved to have counsel removed, and again the District Court denied the motion.

On August 23, 2002, at the request of appointed counsel, Dr. Robert Fox, M.D., a psychiatrist, met with

Pierce at SCI-Greene for 2 1/2 hours. Dr. Fox introduced himself as a medical doctor who had come to discuss Pierce's physical complaints and conduct a physical examination. App. 500. Pierce was satisfied with the introduction and agreed to cooperate. Dr. Fox began by asking Pierce to explain the nature of his physical ailments and concerns, and, without further prompting, Pierce described in detail bizarre scenarios concerning how correctional officers, by secretly drugging him, had damaged his body and changed his physical appearance.[1]

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[1] For example, Dr. Fox stated:

> [Pierce] believes that the guards have perfected a way to alter his appearance without leaving any physical trace that they had conducted these procedures. Included in the changes to his appearance that he described was the loss of his hair, and surgical changes to his nose and face. He also related that the guards had secretly cut his hair, that they had given him hair transplants, [and] performed plastic surgery on his hairline, nose, eyebrows, lips and chin. He described at length the way that the hair on his chest, forearm, legs and groin had been removed or gray hairs had been implanted.
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> * * * *
>
> He also related an elaborate description of how he had been brainwashed while in prison. . . . He told me that he had undergone an electroencephalogram during which a "radio transmitter" or "transponder" had been implanted in his brain. Following this implantation he began to hear a voice speaking to him. He said the first time that he heard it the voice said, "Hi, Mike. I know telepathy like you. I'm a genius, too." He

(Continued)

In addition to this lengthy in-person interview and opportunity to personally observe Pierce, Dr. Fox also reviewed extensive background materials. Despite not performing a mental status examination, Dr. Fox was able to form an opinion. To a reasonable degree of medical certainty, he concluded that Pierce suffers from chronic paranoid schizophrenia, that his paranoid psychosis has existed since at least 1986 or 1987, and that he also has suffered from polysubstance dependence. Medical records from the Pennsylvania Department of Corrections, see Appellee's Brief, at 7-13, confirmed Pierce's paranoid psychosis and auditory hallucinations, he concluded. App. 506. Moreover, Pierce was suffering from the impact of these illnesses in 1989 at the time of his crime and was unable to appreciate the wrongfulness of his conduct, Dr. Fox concluded. App. 507. Finally, Dr. Fox expressed opinions that Pierce was not competent to stand trial, and, importantly for our purposes here, that he currently is unable to assist habeas counsel. He added that, if he had seen Pierce in a civil context, he would have opined that Pierce required a conservator or guardian to prosecute, protect or handle his affairs. Id.

Counsel filed an amended habeas petition in December 2002, and contended, among other claims, that Pierce was incompetent at the time of trial, trial counsel failed to investigate and litigate the issue of his incompetence, and he is currently incompetent. The petition contained only mental health claims that could be raised without Pierce's input,

(Continued)

> indicates that he has been hearing this voice continuously since 1992 when the "transmitter was implanted."

App. 501, 503.

according to counsel, and not other potential claims that Pierce might want to raise, because counsel was unable to have a rational communication with him. See Appellee's Jurisdictional Response, at 2.[2]

In February 2003, habeas counsel filed a petition for involuntary commitment to a forensic facility for an evaluation. Relying on Dr. Fox's examination, recent records reviews conducted by Robert Sadoff, M.D., Larry Rottenberg, M.D., and Dr. Tepper, and their own experiences in the preceding months trying, but failing, to circumvent Pierce's delusional thinking, counsel asserted that Pierce is not rationally able to assist in the habeas proceedings. Counsel argued that commitment of a capital defendant in a habeas proceeding was permissible under the Supreme Court's decision in Rees v. Peyton, 384 U.S. 312 (1966) (per curiam).

As we have explained, the petition for involuntary commitment made a reasonably strong showing that Pierce was acutely mentally ill in 2002 when Dr. Fox evaluated him. The District Court thus held a conference and invited the Commonwealth to identify a forensic psychiatrist to participate in an evaluation of Pierce's current competence to participate in his capital habeas litigation. Instead of identifying an expert to address Pierce's current mental state, the Commonwealth filed written opposition to the motion, contending that the state courts' 1989, 1997, and 1999 findings of competency were not stale, and that, even if Pierce is not currently competent to conduct this litigation, the District Court should explore the possibility of appointing a "next

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[2] A claim that Pierce is not competent to be executed was raised in the counseled habeas petition but is not yet ripe because execution is not imminent and no death warrant has issued. See generally Mata v. Johnson, 210 F.3d 324, 330 (5th Cir. 2000).

friend," Whitmore v. Arkansas, 495 U.S. 149 (1990), to assess what Pierce wants to do.

In October 2003, the District Court granted the motion for a commitment to a secure psychiatric facility for a long-term evaluation to determine Pierce's current competence to rationally assist habeas counsel and to determine whether he suffers from paranoid schizophrenia or any other mental illness. The order did not identify a particular facility nor did it determine the length of the commitment. The court expressed the belief that appointment of a next friend would not be helpful because the question was whether Pierce's incompetence rendered him unable to assist counsel, and he did not want to be evaluated voluntarily to answer that question.

The Commonwealth moved for reconsideration, or, in the alternative, for permission to appeal under 28 U.S.C. § 1292(b), arguing that transfer to a psychiatric facility for a "forced" evaluation triggers certain due process rights which have not been afforded to Pierce, and that habeas counsel is forcing a litigation strategy on him that he does not want. The Commonwealth further suggested that "conflict" counsel be appointed.

The District Court denied the motion for reconsideration in December 2003 and would not certify the issue for appeal under section 1292(b). The court stated that "it seems to me that reasonable people would agree that based upon the record in this case, the petitioner needs the evaluation ordered by this court. . . ." The District Court indicated the need for a status conference before execution of the commitment order, but the Commonwealth filed a notice of appeal. Following the appeal, the District Court stayed implementation of its commitment order.

Our Clerk sent a letter to counsel noting the apparent absence of jurisdiction over what appeared to be an interlocutory order and invited responses. Both parties filed a response. We then deferred decision on the jurisdictional question and ordered briefing on the merits. The parties have filed briefs, which incorporate their previous jurisdictional responses, all of which we have carefully reviewed. The Commonwealth has asked us to find jurisdiction under the collateral order doctrine, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), a request we decline.

We will dismiss the appeal for lack of jurisdiction. Only final decisions of a district court are appealable. 28 U.S.C. § 1291. An order committing a state capital habeas petitioner for psychiatric evaluation is not a final order on the merits of his habeas petition. Section 1291 provides a basis for jurisdiction here only if the commitment order falls within a narrow class of "collateral" orders that may be reviewed. Under the collateral order doctrine, we may review an order if it (1) finally resolves a disputed question; (2) resolves an important question completely separate from the merits of the case; and (3) is effectively unreviewable or inadequately vindicable on appeal from a final judgment. Coopers & Lybrand, 437 U.S. at 468. See also In re: Ford Motor Co., 110 F.3d 954, 958 (3d Cir. 1997).

The Cohen requirements are a matter of an appellate court's subject matter jurisdiction, and thus we must assess the question without regard to whether the parties believe that jurisdiction exists. Digital Equipment Corp. v. Desktop Direct Inc., 511 U.S. 863, 869 n.3 (1994). Historically, the Supreme Court has applied the collateral order doctrine in criminal cases only in narrow circumstances. See Flanagan v. United States, 465 U.S. 259, 265 (1984). See also United States v. Williams, 413 F.3d 347, 354-55 (3d Cir. 2005) (rule

of finality has special force in criminal prosecutions). Strictly speaking, habeas is a civil, not criminal, proceeding, but the Supreme Court's decisions in Digital Equipment Corp., 511 U.S. at 868, and Will v. Hallock, 126 S. Ct. 952 (U.S. 2006), make it clear that the collateral order doctrine is a narrow exception that "should stay that way," even in civil cases. Id. at 958. Importantly, the final judgment rule promotes efficient judicial administration by emphasizing the deference an appellate court owes to the district court's decisions on the many questions of law and fact that arise before judgment. Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430 (1985).

We conclude that the balance in this case tips in favor of rigorous application of the final judgment rule. Our decision that the collateral order doctrine does not apply here rests on the second Cohen prong, concerning whether the order (a) resolves an important question (b) completely separate from the merits, and to some extent on the third prong. If any one prong is not satisfied, jurisdiction is defeated. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 276 (1988). We will assume for the sake of argument that the first Cohen prong is satisfied, that is, that the commitment for evaluation order finally resolves a disputed question.

The Commonwealth contends that a line of cases finding pretrial involuntary commitment orders appealable under the collateral order doctrine, United States v. Deters, 143 F.3d 577 (10th Cir. 1998); United States v. Rinaldi, 351 F.3d 285 (7th Cir. 2003); United States v. Davis, 93 F.3d 1286 (6th Cir. 1996); and United States v. Weissberger, 951 F.2d 392 (D.C. Cir. 1991), apply here, because the commitment is involuntary and the question of involuntary commitment satisfies the Cohen "importance" prong under Sell v. United States, 539 U.S. 166 (2003). Moreover, there is no

effective relief for involuntary confinement once it has taken place. See Appellant's Jurisdictional Response, at 2-3.

The Commonwealth further asserts that Pierce's habeas attorneys are trying to commit him against his will, that he does not want to be moved to a psychiatric facility, and "there may be stigma attached with such a transfer; or, a person who believes himself sane may feel dehumanized and demeaned by commitment." Id. at 4. It asserts that "someone who does not want to pursue mental health issues in his habeas litigation (which is clearly the position Pierce took in state court) may feel that commitment is the first step toward forcing him to accept a legal strategy that he does not want." Id. The Commonwealth goes on to say that it takes "little imagination" to grasp that Pierce's habeas counsel "hope to create a basis for arguing that he was incompetent to stand trial, or that more mental health evidence should have been presented to the trial court, or during the sentencing hearing." Id. at 6. Furthermore, it has a strong interest in defending the conviction and the court's order requires release from state custody.

In its merits brief, the Commonwealth has complained that habeas counsel obtained an ex parte order from the District Court, prior to filing the involuntary commitment petition, which authorized an MRI and PET scan of Pierce at the University of Pittsburgh Medical Center that was only vacated when the Commonwealth discovered the order and protested. See Appellant's Brief, at 13.

We are not persuaded by these arguments to extend the collateral order doctrine here. First, we do not agree that the issue is completely separate from the merits of the case. Coopers & Lybrand, 437 U.S. at 468. As Pierce's merits brief plainly evidences, his competence will be a primary basis for his habeas petition. See, e.g., Appellee's Brief at 14

("The state court record (both trial and post-conviction) reveals significant indicia of Mr. Pierce's mental illness."), 16 ("Mr. Pierce's paranoia and impaired mental health dominated his relationships with the attorneys who tried to represent him in state court."). Thus, we cannot address the competency-related issues raised in this appeal without touching on an issue central to the merits of the habeas petition. See Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1117 (3d Cir. 1986); New York v. U.S. Metals Refining Co., 771 F.2d 796, 799-800 (3d Cir. 1985).

Second, the Commonwealth's cases do not support application of the collateral order doctrine. In Deters, 143 F.3d 577, the defendant's lawyer asked for a pretrial competency evaluation under 18 U.S.C. § 4241 and § 4242, and the defendant asked to be examined on an outpatient basis. The court ordered an inpatient commitment, and the defendant appealed on the ground that the commitment order deprived her of liberty without due process. The Tenth Circuit held that the order was appealable under the collateral order doctrine, reasoning that a deprivation of liberty for 45 days was important. Deters, 143 F.3d at 580.

In Weissberger, 951 F.2d 392, the District of Columbia Circuit held that an appeal from a competency evaluation order was akin to an appeal from the denial of bail, and, as is the case with denial of bail, post-confinement review provides no relief for the loss of liberty associated with the competency evaluation. Id. at 396 (citing Stack v. Boyle, 342 U.S. 1, 6 (1951)). The court explained: "As in the case of pretrial detention, an appellant cannot be left without recourse to appellate review in a situation where he faces an immediate and significant loss of personal liberty." Weissberger, 951 F.2d at 397 (footnote omitted).

In Rinaldi, 351 F.3d 285, the district court ordered the defendant to be committed for 45 days. The defendant, who was not in custody at the time, appealed, and the Seventh Circuit assumed jurisdiction under the collateral order doctrine. Applying Stack, the court reasoned that, when an order calls for a defendant's incarceration, appellate review is proper. Id. at 288. The Sixth Circuit's decision in Davis, 93 F.3d 1286, which involved similar facts, is in accord, id. at 1289. See also United States v. Friedman, 366 F.3d 975, 979-80 (9th Cir. 2004) (accord).

Thus, Deters, Weissberger, Rinaldi, and Davis all involved individuals who were not in custody at the time of the commitment orders. The courts' analysis of the issue whether the commitment order was important and effectively unreviewable on appeal from a final judgment turned on a loss of liberty. There is nothing "important," as that term is understood under Cohen, about the issue raised by this appeal as Pierce is in custody as a death row inmate. The cases cited by the Commonwealth are not persuasive in the context of this case, because Pierce will be in custody in one place or another. Importance has a particular meaning under Cohen. See Ford Motor Co., 110 F.3d at 959. "It does not only refer to general jurisprudential importance. Rather," an issue "is important if the interests that would potentially go unprotected without immediate appellate review are significant relative to efficiency interests sought to be advanced by adherence to the final judgment rule." Id.

Similarly, whether a right is 'adequately vindicable' or 'effectively unreviewable' under the third Cohen prong is answered by a judgment about the value of the interests that would be lost through rigorous application of the final judgment requirement. Digital Equipment, 511 U.S. at 878-79. In Vitek v. Jones, 445 U.S. 480 (1980), the Supreme Court held that transfer of a prisoner to a mental hospital triggers

certain due process protections that perhaps were not afforded here, but Vitek is not particularly instructive because it is not a collateral order doctrine case; it does not address the question of "importance" relative to the interests sought to be advanced by adherence to the final judgment rule. In any event, Vitek involved an open-ended civil commitment and involuntary treatment unrelated to any ongoing court proceedings rather than an inpatient evaluation for the limited purpose of determining competence to assist counsel.

As noted by the Commonwealth, the Supreme Court recently approved application of the collateral order doctrine to an order forcing medication on a defendant in Sell, 539 U.S. 166. The Court reasoned that the legal right to avoid forced medication "raises questions of clear constitutional importance" and "is completely separate from the merits of the action, *i.e.*, whether Sell is guilty or innocent of the crimes charged" and "wholly separate as well from questions concerning trial procedures." Id. at 176. With respect to the third Cohen prong, the Court reasoned that an acquittal would not undo the harm of forced medication. Id. at 176-77.

The cases relied on by the Court, id., to establish "importance" under Cohen were Winston v. Lee, 470 U.S. 753, 759 (1985), involving a serious surgical intrusion into an individual's body to obtain evidence that the state had failed to demonstrate a compelling need for, Riggins v. Nevada, 504 U.S. 127, 133-34 (1992), involving forcing a heavy dose of antipsychotic medication on a defendant during trial, Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 278-279 (1990), involving the artificial feeding and hydration of an individual in a persistent vegetative state, and Washington v. Harper, 494 U.S. 210, 221-222 (1990), involving, in a civil rights action, whether due process

requires a judicial hearing before a state may treat a non-consenting convicted prisoner with antipsychotic medication.

We do not interpret Sell to require application of the collateral order doctrine here, because we are not faced with the more severe intrusion of forcing antipsychotic medication on an unwilling defendant who is not a danger to himself or others. Nor are we faced with any other sort of forced physical intrusion of the kind noted in Winston, Riggins, Cruzan, or Harper. Instead, Pierce will be transferred for observation and evaluation. He may voluntarily agree to be interviewed, as he did with Dr. Fox with only minimal prompting, or he may even agree to some form of therapeutic intervention, but if he refuses to participate, then all that will happen to him is that he will be housed in a custodial setting and observed, just as he is now.[3]

In the wake of Sell, courts have applied the collateral order doctrine to involuntary medication orders, see, e.g., United States v. White, 431 F.3d 431, 432-33 (5th Cir. 2005); United States v. Morrison, 415 F.3d 1180, 1184 (10th Cir. 2005); United States v. Bradley, 417 F.3d 1107, 1109 & n.1 (10th Cir. 2005), but the parties have not called our attention to any decisions applying the collateral order doctrine to commitment orders that do not involve an actual loss of liberty, cf. Stack, 342 U.S. at 6, or a severe intrusion like involuntary medication. Cf. United States v. Weston, 194 F.3d 145, 148-49 (D.C. Cir. 1999) (leaving open whether

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[3] Initially, Pierce agreed to undergo neuroimaging at the University of Pittsburgh Medical Center because of his desire to find the transponder he believes was implanted in his brain. After the District Court ordered the testing, Pierce refused to cooperate, and that was the end of the matter. See Appellee's Brief, at 23 n.23.

Weissberger, 951 F.2d 392, extends to psychiatric examination that does not involve actual loss of liberty).

In Bacher v. Allstate Ins. Co., 211 F.3d 52 (3d Cir. 2000), we were asked to extend our holdings that the requirements of the collateral order doctrine are satisfied when a party appeals a discovery order involving privileged information or a trade secret, see Montgomery County v. Microvote Corp., 175 F.3d 296, 300 (3d Cir. 1999) (attorney-client and work product privileges); Ford, 110 F.3d at 957-64 (same); Smith v. BIC Corp., 869 F.2d 194, 198-99 (3d Cir. 1989) (trade secrets), to disclosure of sensitive information, and we declined to do so. We drew the line in Bacher, because we were concerned that the "sheer number of discovery rulings and the myriad procedural requirements governing them" would "provide fertile soil for the growth of appealable orders" that "would only disrupt and delay district court proceedings and clog the courts of appeals with matters more properly managed by trial courts familiar with the parties and their controversy." Bacher, 211 F.3d at 54-55.

Those same concerns inform our decision here. Extending the collateral order doctrine to all involuntary commitment orders, see Digital Equipment, 511 U.S. at 868 (collateral order doctrine should apply to broad categories of orders without concern for individual circumstances of particular cases), would be a dramatic extension of the doctrine, the need for which has not been demonstrated here. We recognize that "the strong bias of § 1291 against piecemeal appeals almost never operates without some cost" and "almost every pretrial or trial order might be called 'effectively unreviewable' in the sense that relief from error can never extend to rewriting history." Digital Equipment, 511 U.S. at 872. However, there is no traditionally recognized basis for assuming jurisdiction under the collateral order doctrine in this context, and thus we must resist the

temptation to extend either Sell or Deters, Weissberger, Rinaldi, and Davis any further.

Furthermore, we simply cannot ignore the fact that Pierce himself has not appealed. As the parties have amply demonstrated, he has a history of making arguments on his own behalf. Throughout the years of his incarceration, he has filed numerous frivolous civil rights lawsuits, complaining about poisoning, bodily intrusions, tamperings with his hair, and unauthorized plastic surgeries, see Appellee's Brief, at 5-7, and, of course, he made his feelings known repeatedly during his criminal case that he did not wish to pursue psychiatric defenses.[4] In this, his capital habeas litigation, he abandoned any efforts to have counsel removed early in the litigation. After initially asking the District Court for new or standby counsel twice in the spring of 2002, there were, and have been, no further attempts by Pierce to have counsel removed.[5] Accordingly, if the important right to be vindicated by an immediate appeal is indeed Pierce's right to avoid the stigma of a psychiatric commitment, he certainly is not making that argument.[6]

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[4] We are merely making an observation about the record. We express no view whatever on whether Pierce's waivers were competent or informed, as those issues go to the heart of the merits of his habeas petition.

[5] Pierce corresponded with us once. Early in this appeal our Clerk received a letter from him that was illegible. It was returned to him by court staff with a request that he print clearly or type, and the Court has not heard from him since.

[6] We also question both habeas counsel's and the Commonwealth's assertion that Pierce is opposed to *any* form of evaluation or treatment. Dr. Fox noted in his affidavit that, although Pierce

(Continued)

The Commonwealth's other arguments in favor of our assuming jurisdiction are equally unavailing. In its merits brief on appeal the Commonwealth takes aim at Dr. Fox's 2002 evaluation, arguing that there was "plenty of room for cross-examination," and that the opinion was not enough to justify an involuntary commitment. For example, Dr. Fox "does not say whether Pierce has *episodes* of schizophrenia or delusions, followed by periods of remission; he does not say whether Pierce has delusions about some things, but not others -- all of which would impact Pierce's competence at a particular time, or on a particular topic." See Appellant's Brief, at 39-40. These may be valid points, but the Commonwealth was given an opportunity by the District Court to identify an expert to rebut Dr. Fox's assertions concerning Pierce's current mental state and it declined the offer. The Commonwealth cannot refuse to participate in the proceedings below and then expect the court of appeals to intervene. Cf. Cohen, 337 U.S. at 546 ("Appeal gives the upper court a power of review, not one of intervention").

With respect to forcing a litigation strategy on Pierce, any question of competence to waive claims is premature. See Rohan ex rel. v. Woodford, 334 F.3d 803, 816 (9th Cir. 2003). If Pierce is found to be competent after the evaluation, then habeas counsel will be appropriately guided in regard to presenting "his claims" to the District Court.

(Continued)

has consistently refused to be psychiatrically evaluated for any purpose related to guilt phase defenses or for the presentation of mitigating evidence, he has not refused mental health evaluations by correctional or court staff. App. 498. The Department of Corrections progress notes further indicate that Pierce also has taken low doses of antipsychotic medication, although not recently.

The Commonwealth is concerned that Pierce's lawyers, in having him committed, will have a further opportunity to create a basis for arguing that he was incompetent to stand trial, or that more mental health evidence should have been presented to the trial court or during the sentencing hearing, see Appellant's Jurisdictional Response, at 6, but it is the District Court's responsibility to adequately "police the prejudgment tactics" of habeas counsel, if that is, in fact, required. Richardson-Merrell, 472 U.S. at 436. Furthermore, the Court's order does not release Pierce from state custody -- it is a temporary measure to accomplish a specific and finite goal, that is, *evaluation*, within the confines of a custodial setting, and it is not clearly beyond the discretion of the District Court in aid of its jurisdiction, Rees, 384 U.S. at 314;[7] cf. 18 U.S.C. §§ 4241(a), 4247(b) (West 2000) (authorizing temporary commitment of federal prisoner upon reasonable cause to believe he may presently be suffering from mental disease or defect rendering him mentally

[7] In Rees, counsel filed a petition for writ of certiorari, but the petitioner then directed him to withdraw it. Counsel advised the Supreme Court that he could not in good conscience withdraw the petition. He then had the petitioner examined by a psychiatrist who concluded that the petitioner was mentally incompetent. The Supreme Court, "in aid of the proper exercise of its certiorari jurisdiction," id. at 313, directed the district court to determine the petitioner's capacity to make a rational choice with respect to continuing or abandoning further litigation, and to subject him, if necessary, to temporary federal hospitalization. The Court explained that "Whether or not Rees shall be allowed in these circumstances to withdraw his certiorari petition is a question which it is ultimately the responsibility of this Court to determine, in the resolution of which Rees' mental competence is of prime importance." Id. at 313. The Court looked to 18 U.S.C. §§ 4244-4245, involving commitment of convicted federal prisoners, for analogous support for temporary hospitalization of a state habeas petitioner. Id. at 314.

incompetent to extent that he is unable to understand nature and consequences of proceedings against him or to assist properly in his defense").[8]

We will dismiss the appeal for lack of jurisdiction.

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[8] The state Mental Health Procedures Act, 50 Pa. Cons. Stat. Ann. § 7101 et seq. (West 2001), is not applicable in this context.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL PIERCE, Petitioner,	:	CIVIL ACTION
	:	NO. 02-513
v.	:	
	:	
JEFFREY BEARD, et al., Respondents.	:	

FILED DEC 19 2003
ENTERED DEC 23, 2003

MEMORANDUM

BUCKWALTER, S.J. December 18, 2003

Respondent's motion for reconsideration raises both old and new issues with regard to this court's order of October 3, 2003. However, it seems to me that reasonable people would agree that based upon the record in this case, the petitioner needs the evaluation ordered by this court and no hearing is necessary to reach that conclusion. In other words, none of the arguments made by respondent in its present motion warrant any change in the October 3, 2003 order. There is a necessity, I believe, for a status conference before executing the court's order of October 3, 2003.

As to the motion for immediate appeal, respondent does not begin to meet the prerequisites for what is an infrequently granted remedy. Petitioner's arguments beginning on page 9 of his brief are sound in this regard and are adopted

by reference thereto in denying the request for immediate appeal.

An order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL PIERCE,	:	CIVIL ACTION
Petitioner,	:	
	:	NO. 02-513
v.	:	
	:	
JEFFREY BEARD, et al.,	:	
Respondents.	:	

ORDER

AND NOW, this 18th day of December, 2003, it is hereby **ORDERED** that Respondent's motion for reconsideration, or in the alternative, to permit an immediate appeal (Docket No. 40) is **DENIED.** However, in accordance with the memorandum, a **STATUS CONFERENCE** is scheduled for Wednesday, January 7, 2004 at 4:30 p.m. in the chambers of the undersigned.

BY THE COURT:

/s/
RONALD L. BUCKWALTER, S.J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL PIERCE, Petitioner,	:	CIVIL ACTION
	:	NO. 02-513
v.	:	
JEFFREY BEARD, et al., Respondents.	:	

FILED OCT 3 2003
ENTERED OCT 6, 2003

MEMORANDUM AND ORDER

BUCKWALTER, J. October 3, 2003

In response to the Petition for Involuntary Commitment filed by counsel for Petitioner (Docket No. 30), the Respondents suggest that before the court enter such an order, it should determine what Petitioner himself wants to do. This could be accomplished, Respondents argue, by a filing of a petition by a putative "next friend" and at a subsequent hearing, the court could determine whether Petitioner is truly incompetent and whether "the friend" is acting to further Pierce's interest.

But, it is difficult in the context of this particular case to see how that would be helpful to Petitioner where the issue is whether his incompetence renders him unable to assist counsel and where it is conceded that he does not want to be evaluated voluntarily to answer that question.

The record attached to the petition (part of which apparently Respondents overlooked) gives rise to the belief that Petitioner might presently be incompetent and thus be unable to at present rationally assist counsel. Under the circumstances, and after consideration of the briefs filed by both parties, the following order is entered:

AND NOW, this 3rd day of October, 2003, upon motion of counsel for Petitioner, Michael Pierce (Docket No. 30), and Respondents' reply, it is hereby **ORDERED** that Petitioner be committed to a secure psychiatric facility for purposes of a long-term psychiatric evaluation. Said evaluation is to include an assessment of Petitioner's current competency to rationally assist counsel, as well as determine whether Petitioner suffers from Paranoid Schizophrenia or any other mental illness. It is further **ORDERED** that a complete copy of Petitioner's records from the Pennsylvania Department of Corrections, and the reports of Drs. Sadoff, Rotenberg, Fox and Tepper be provided to the evaluators for their consideration and review.

BY THE COURT:

/s/
RONALD L. BUCKWALTER, J.

[J-095-00]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	No. 207 Capital Appeal Docket
	:	Appeal from the Order entered December 7, 1997 in the Court of
v.	:	Common Pleas, Philadelphia County, Criminal Division at No. 8908-1312-1321 and 9008-0323-0327.
MICHAEL PIERCE, Appellant	:	SUBMITTED: April 5, 2000

OPINION

MADAME JUSTICE NEWMAN
DECIDED: December 21, 2001

Michael Pierce (Appellant) appeals, pro se, from the denial of his first petition for post-conviction relief, pursuant to the Post Conviction Relief Act (PCRA).[1] We affirm.

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[1] 42 Pa.C.S.§§ 9541-9546.

I. FACTUAL AND PROCEDURAL HISTORY

We described the facts of Appellant's convictions for three counts of first-degree murder and related charges in our opinion on direct review as follows:

> The evidence presented in the instant case established that at approximately 3:00 a.m. on the morning of July 10, 1989, Joan Pierce, the appellant's sister, was awakened by the strong smell of gasoline. Joan woke her father, George Pierce, and the two of them descended the stairs to discover the living room sofa on fire. George Pierce opened the basement door and flames then shot forth, forcing them to flee the house. George reentered the house in an attempt to rescue his wife and mother-in-law. George was unable to reach the stairs and collapsed inside. He was pulled out of the flaming building by neighbors who had been awakened by the fire.
>
> George was taken from the scene to a hospital where he was treated for burns and smoke inhalation. Eventually he was transferred to a nursing home where he died six months later from complications due to smoke inhalation and bronchopneumonia. Appellant's mother, Mary Pierce and her ninety-five-year old mother, Anna Hayes, were pronounced dead at the scene, with the cause of death later determined to be smoke and soot inhalation.
>
> Upon investigation, experts from the Philadelphia fire department determined that the

house burned down as a result of two separate fires, each having been deliberately set. The minor cause of the fire was found to have been deliberately caused by an open flame being struck to the sofa. The major cause of the fire was found to have occurred in the basement by use of an accelerant. In the opinion of the fire department expert, a plastic anti-freeze bottle found on the basement floor had been filled with gasoline and deliberately set ablaze. In the opinion of the fire department investigator, the fire was the result of arson. The Pierce home was located at 3011 Byberry Road in Philadelphia and was physically located within a row of attached houses.

Sharon DeFazio, a neighbor, testified that she recognized the anti-freeze bottle as identical to the one George Pierce used as a container for gasoline for his lawnmower. Ms. DeFazio testified that Mr. Pierce had, shortly before the fire, given her a similar bottle filled with gasoline for her lawnmower, explaining that it was a safer container in which to keep gasoline. Ms. DeFazio also knew where in his garage Mr. Pierce had kept his anti-freeze bottle containing gasoline. After the fire, the anti-freeze bottle containing gasoline was not found in the Pierce garage.

In the garden behind the Pierce home a partial impression of a shoe print was discovered. Soil samples taken from the impression matched soil samples taken from the boots the appellant was wearing on the morning of the fire. A short distance away from and to the

rear of the Pierce home, in an area of abandoned buildings, police discovered a partially used book of matches. The same type of matchbooks [sic] were found in a box of matchbooks at the home of Tim O'Reilly, where the appellant had been staying the week preceding the fire. The area containing the abandoned buildings was surrounded by a fence. On the top rail of the fence police discovered a soil sample which matched with the samples taken from the impression in the garden of the Pierce home and the sample from the appellant's boots.

At the time the fire was raging two teen-age boys were in the vicinity. The boys, Harry Espanshade [sic] and Randy Zehnder, approached two officers who were in the area on an unrelated matter and told them of the fire. The boys then began to walk through the woods towards the fire. As they were proceeding towards the fire, they saw a man running away from the fire wearing jeans and a flannel shirt over a dark T-shirt. The boys immediately gave the police a description of the man. A few minutes later they again saw the man, this time without the flannel shirt. Two hours later while at the scene of the fire the boys saw the same man walking up the street toward the Pierce home. They identified him as the appellant.

Police Sergeant Shanfield was one of the officers who had been notified of the fire by Harry and Randy. As he was driving towards the Pierce house a man crossed in front of his

car and ran into the woods. As the man was running Sergeant Shanfield observed him stumble. Two and one-half hours later the Sergeant saw appellant at the police station and recognized him as the man he had seen running into the woods earlier. After appellant was arrested, he was treated at the Philadelphia county prison for an injury to his toe.

Joan Pierce, appellant's sister, testified that her parents and appellant had a very strained relationship. Appellant had accused his parents of putting steroids in his food and depriving him of an inheritance from his Uncle Al. One week prior to the fire George and Mary had asked appellant to leave the family residence. Appellant had told Joan on many occasions that he hated their parents and threatened to kill them. Joan had seen appellant on Sunday night before the fire; he was wearing jeans, a dark T-shirt and a red flannel shirt and boots.

The week before the fire appellant had been living with his friend Tim O'Reilly and Tim's mother across the street from his parents' home. Mrs. O'Reilly testified that during that week appellant had told her that he would have no peace while his parents were alive. Appellant told Mrs. O'Reilly that he would get away with murdering his parents and would flee to Indonesia. Mrs. O'Reilly related this conversation to Joan Pierce.

Tim O'Reilly testified that during the week appellant stayed in his home, appellant

repeatedly expressed the intent to kill his parents. Appellant told Tim of his intent to burn down the Pierce home and either commit suicide or escape to Indonesia. Appellant referred to his parents as "the enemy." Appellant explained that he would break his grandmother's neck so she wouldn't have to suffer, or be placed in a nursing home.

Appellant had a disagreement with Tim's mother and decided to leave the O'Reilly home the Sunday before the fire. Appellant left Tim's house about 11:00 p.m. Sunday night before the fire. At that time he was wearing a dark blue or green T-shirt, jeans and boots, and carrying a black and red flannel shirt Tim had given him.

At approximately 3:25 a.m. on the morning following appellant's departure from the O'Reilly home, Tim was in his kitchen when he noticed lights on in the Pierce garage and observed the garage door partially opened. About ten minutes later the lights went out and he heard a thud and then saw the garage door was closed. Two minutes thereafter he saw the fire erupt in the Pierce home. Tim called the police and went outside to help with the fire.

Appellant was arrested later that morning when he was observed walking towards the Pierce home.

Commonwealth v. Pierce, 645 A.2d 189, 192-194 (Pa. 1994).

At the conclusion of Appellant's trial on October 30, 1990, a jury convicted Appellant of three counts of first-degree murder, arson, aggravated assault, recklessly endangering another person, and risking a catastrophe. Following a one-day penalty hearing, the jury sentenced Appellant to three concurrent death sentences for each first degree murder conviction, finding that the two aggravating circumstances, 42 Pa.C.S. § 9711(d)(6) (killing while in the perpetration of a felony) and 42 Pa.C.S. § 9711(d)(7) (knowingly creating grave risk of death to another), outweighed the one mitigating factor, 42 Pa.C.S. § 9711(e)(1) (no significant history of prior criminal convictions). Appellant obtained new counsel and filed post-verdict motions alleging trial counsel's ineffectiveness. The trial court denied these motions. On direct appeal, we affirmed Appellant's Judgment of Sentence. See Pierce, supra.

The present proceedings commenced when Appellant filed a pro se PCRA petition on October 5, 1994. The PCRA court appointed counsel, who filed an Amended Motion for Post-Conviction Collateral Relief on June 28, 1995. Appellant, through his then counsel, Bernard Siegel, Esquire, filed a Supplement to Amended Motion for Post-Conviction Collateral Relief on January 23, 1997 and a Second Supplement to Amended Motion for Post-Conviction Relief on November 12, 1997. The PCRA court held multiple hearings regarding the status of Appellant's petition and his counsel's request that Appellant undergo psychiatric or psychological evaluation to explore potential PCRA issues concerning the effectiveness of prior counsel in developing mental health mitigation evidence during the penalty phase of Appellant's trial. The PCRA court permitted Appellant to retain a psychologist and held a hearing on July 30, 1997, at which Appellant was present and stated on the record his refusal to

undergo psychological evaluation.[2] Because Appellant refused to cooperate with the presentation of any potential issues regarding the effectiveness of counsel in investigating possible mental health mitigation evidence, the PCRA court determined that no further evidentiary hearing was needed on Appellant's remaining PCRA claims and dismissed Appellant's petition on December 9, 1997.

Appellant filed a Notice of Appeal to this Court on December 19, 1997 and an Amended Notice of Appeal on January 8, 1998. Appellant's first PCRA counsel, Mr. Siegel, petitioned to withdraw as counsel on May 27, 1998, because his relationship with Appellant had become "substantially hostile" and "unworkable" and because Appellant wished to raise issues regarding Mr. Siegel's effectiveness as PCRA counsel. This Court granted Mr. Siegel's request to withdraw on September 10, 1998, and remanded for the PCRA court to appoint new counsel. The PCRA court appointed Norris Gelman, Esquire, to handle the appeal. On March 17, 1999, Mr. Gelman moved for leave to withdraw as counsel, citing "irreconcilable differences" and specifically noting Appellant's request that he withdraw as counsel. On July 1, 1999, we granted Mr. Gelman's motion to withdraw and remanded for the PCRA court to appoint, for the second time, new counsel for Appellant. The trial court appointed Jules Epstein, Esquire, as Appellant's third PCRA counsel;

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[2] At the July 30, 1997 hearing, counsel explained that Appellant refused to undergo any psychiatric evaluation for the purpose of developing claims related to the presentation of his penalty-phase mitigation case because Appellant wished to limit his challenge to obtaining a new trial. Notes of Hearing 7/30/97 p. 5. Appellant confirmed this and also expressed to counsel his belief that overturning his death sentence without simultaneously obtaining a new trial would hamper his efforts to obtain federal habeas corpus review of his convictions. Id. at pp. 13-14, 31.

however on September 14, 1999, Appellant filed an Application for Withdrawal of Briefing Schedule and Remand for Hearing on Appellant's Request to Proceed Pro Se. On October 13, 1999, we remanded to the PCRA court for a hearing on Appellant's request to proceed pro se on his appeal and whether the court should appoint standby counsel. Pursuant to our directive, the PCRA court conducted a hearing on November 10, 1999, where both Appellant and Mr. Epstein were present. At this hearing, the court questioned Appellant to determine whether he knowingly, voluntarily, and intelligently wished to waive his right to counsel and proceed pro se, and concluded that Appellant understood the consequences of his request and had made an effective waiver of his right to counsel.[3] Accordingly, the court granted Appellant's request to proceed pro se, permitted Mr. Epstein to withdraw as counsel, and appointed Ramy Djerassi, Esquire, as standby counsel for the limited purpose of assisting Appellant to comply with the procedural rules

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[3] Appellant offered the following explanation for his request to proceed pro se:

> The answer to that question is, I wish to proceed pro se, if I may. It is mainly because, not on Mr. Epstein's part so far, but all the prior counsel refused to raise issues or even give me legal reasoning why they could not raise issues I have given to them, right, and I'm going around in circles because I filed three habeas corpuses and the Federal Court is still saying I'm not exhausting the state remedies, and I figured the only way I'm going to get these issues raised so I can get out of this loop I'm in is to go pro se.

Notes of Hearing 11/10/99 pp. 6 - 7.

governing the filing of appellate briefs. Consequently, we must address Appellant's pro se appeal.

II. DISCUSSION

Appellant presents claims of ineffective assistance of appellate counsel that were raised by PCRA counsel and claims of ineffective assistance of PCRA counsel for failing to raise issues that Appellant sought to have reviewed.

To be eligible for relief under the PCRA,[4] Appellant must plead and prove by a preponderance of the evidence that his conviction or sentence resulted from one of the grounds for relief provided in Section 9543. Appellant must also show that none of the claims raised in his petition has been previously litigated or waived.[5] Because all of

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[4] Because Appellant filed his petition in October of 1994, the 1995 amendments to the PCRA do not govern this petition. Consequently, the 1988 version of the PCRA applies. See Section 3(1) of Act 1995 (Spec. Sess. No. 1), Nov. 17, P.L. 1118, No. 32.

[5] The version of Section 9543(a)(3) applicable to Appellant's petition required a petitioner to prove:

> (3) That the allegation of error has not been previously litigated and one of the following applies:
>
> (i) The allegation of error has not been waived.
>
> (ii) If the allegation of error has been waived, the alleged error has resulted in the conviction or affirmance of sentence of an innocent individual.

(Continued)

Appellant's assignations of trial court error and claims of ineffective assistance of trial counsel could have been raised in his post-verdict motions or on direct appeal, those claims are waived.[6] However, the present claims of Appellant relate either to the ineffectiveness of appellate counsel for failing to raise issues on direct appeal, which were included in the PCRA petition, or to the ineffectiveness of PCRA counsel for failing to raise issues of prior counsel's ineffectiveness, which Appellant brings for the first time to this Court. Properly layered ineffective assistance of counsel claims avoid the waiver provisions of the PCRA. Commonwealth v. Pursell, 724 A.2d 293, 302 (Pa.), cert. denied, 120 S. Ct. 422 (1999). Further, Section 9543(a)(2) of the 1988 version of the PCRA provided relief for claims of "ineffectiveness assistance of counsel which, in the circumstances of the

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(Continued)

> (iii) If the allegation of error has been waived, the waiver of the allegation of error during pretrial, trial, post-trial or direct appeal proceedings does not constitute a State procedural default barring Federal habeas corpus relief.

42 Pa.C.S. § 9543(a)(3) (1988 version).

[6] Section 9544(b) provided:

> (b) Issues waived. -- For the purposes of this subchapter, an issue is waived if the petitioner failed to raise it and if it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or other proceeding actually conducted or in a prior proceeding actually initiated under this subchapter.

42 Pa.C.S. § 9544(b) (1988 version).

particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii) (1988 version). Consequently, to the extent that Appellant has raised properly layered claims of ineffective assistance of counsel that were not previously litigated, Appellant is entitled to review of those claims.

The standard for proving ineffective assistance of counsel is well settled. Appellant must prove: (1) that the underlying claim is of arguable merit; (2) that counsel's performance lacked a reasonable basis; and (3) that the ineffectiveness of counsel caused him prejudice. Commonwealth v. Miller, 746 A.2d 592, 598 (Pa. 2000). Prejudice in the context of ineffective assistance of counsel means demonstrating that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. Commonwealth v. Kimball, 724 A.2d 326, 332 (Pa. 1999). This standard is the same in the PCRA context as when claims of ineffective assistance of counsel are raised on direct review. Id.

A. Claims of Ineffective Assistance of Appellate Counsel

1. Failure to Challenge Jury Instruction

In his Amended PCRA petition, Appellant alleged appellate counsel's ineffectiveness for failing to challenge on appeal the trial court's jury instruction regarding murder:

> It will be your duty in this case to determine whether George Pierce, Mary Pierce, and Anna Hayes died as a result of injuries sustained in a fire which was started by this defendant and, if so, whether such

> killing amounted to murder of the first degree, murder of the second degree, murder of the third degree, voluntary manslaughter, or involuntary manslaughter.
>
> You cannot find the defendant -- you cannot find that the defendant killed any of these persons unless you are satisfied beyond a reasonable doubt that the defendant's conduct was the direct cause of their death.

N.T. 10/31/90 p. 899. Appellant objects to the phrase "in a fire which was started by this defendant" and contends that this language compelled the jury to accept as an established fact that Appellant caused the victims' deaths by arson, thus taking away this fact-finding function from the jury.

We disagree. It is axiomatic that a jury charge must be read in its entirety to determine whether it is fair or prejudicial and that the trial court has broad discretion in phrasing its instructions so long as the law is clearly, adequately, and accurately presented to the jury. Commonwealth v. Miller, 746 A.2d 592, 604 (Pa. 2000) (citing Commonwealth v. Smith, 694 A.2d 1086, 1092 (Pa. 1997)). This Court will not review a charge by taking isolated comments out of context. Id. The instruction by the trial court, when read in its full context, informed the jury that they could not find Appellant guilty of any charge of murder or manslaughter unless they first found that the Commonwealth had proven beyond a reasonable doubt that Appellant's conduct "was the direct cause" of the deaths of the victims. See N.T. 10/31/90 p. 899. There is, therefore, no merit to this claim, and appellate counsel was not ineffective for failing to raise it.

2. Failure to Contact Character Witnesses and Witnesses on Defendant's Behalf

As his next assertion of ineffective assistance of appellate counsel, Appellant contends that trial counsel was ineffective for failing to call certain character witnesses and other witnesses purportedly favorable to his defense and that appellate counsel was ineffective for failing to raise this in post-verdict motions or on appeal.

In order to prevail on a claim of ineffective assistance of counsel for failing to call a witness, the appellant must show: (1) the existence and availability of the witness; (2) counsel's awareness of, or duty to know of, the witness; (3) the willingness and ability of the witness to cooperate and appear on behalf of the defendant; and (4) the necessity of the proposed testimony in order to avoid prejudice. Commonwealth v. Priovolos, 715 A.2d 420, 422 (Pa. 1998). None of the individuals identified by Appellant as favorable witnesses satisfies this standard. First, Appellant identifies three inmates and two guards from Holmesburg prison who allegedly observed him shortly following his arrest and who would have testified regarding the condition of Appellant's foot when arrested. However, Appellant fails to offer affidavits[7] from these individuals or to supply proof that they were

[7] Appellant includes in his pro se brief a statement signed by one Pedro Cruz and dated October of 1990, in which Mr. Cruz asserts that he was held in the Detention Center when Appellant was arrested in July of 1989 and that he observed that Appellant's left foot was swollen. There is no indication in this statement that Mr. Cruz would have been willing to testify on Appellant's behalf at his trial. Further, even if Mr. Cruz would have been willing to testify on Appellant's behalf, there is nothing in Mr. Cruz's statement that exonerates Appellant because it is undisputed that

(Continued)

available and would have testified on his behalf at trial. Next, Appellant names two neighbors, Carl Tegeder and Jan Shafransky, who Appellant avers would have testified, respectively, that: (1) Appellant left his family's home voluntarily instead of having been told to leave, as the Commonwealth argued; and (2) Tim O'Reilly started a false rumor that Appellant had threatened his family. Again, Appellant fails to offer any proof that these witnesses were available and would have testified favorably for him at trial.[8] Finally, Appellant relies on a letter from Maryanne Bonzcyk to demonstrate Ms. Bonzcyk's willingness to testify on his behalf as a character witness whom trial counsel should have called. This assertion is wholly without merit, as Ms. Bonzcyk admits in the letter that she was "not sure how much my testimony would help [Appellant]" because she would have to tell the truth about "the bad times in [Appellant's] life," including his drug use. Appellate counsel was not ineffective for failing to pursue these matters.[9]

(Continued)

Appellant's foot was injured by the time he had been placed in custody subsequent to the commission of the crimes. See Pierce, 645 A.2d at 193.

[8] Appellant relies on an incomplete copy of a written investigation report by Detective Dembeck describing an interview with Mr. Tegeder, in which the detective asked him, "Did George [Pierce] ever mention any problems?" to which Mr. Tegeder responded, "On Saturday, 7-2-89, George told me that [illegible] his son was moving out." The remainder of this investigation report is omitted. Appellant offers nothing with respect to Jan Shafransky.

[9] Appellant includes a list of individuals whom he claims should have been called as witnesses. See Brief of Appellant,

(Continued)

3. Failure to Raise Issue of
Prosecutorial Misconduct

In his third claim of ineffective assistance of appellate counsel, Appellant complains that counsel should have raised an issue of prosecutorial misconduct based on the prosecutor's statement during closing argument that the fire was started by the use of gasoline contained in an antifreeze jug.

It is well established that a prosecutor must have reasonable latitude in presenting a case to the jury and must be free to present his or her arguments with logical force and vigor. Commonwealth v. D'Amato, 526 A.2d 300, 309 (Pa. 1987). Counsel's remarks to the jury may contain fair deductions and legitimate inferences from the evidence presented during the testimony. Id., citing Commonwealth v. Fairbanks, 306 A.2d 866 (Pa. 1973). Thus, the prosecutor is entitled to refer to the evidence and argue that it establishes the guilt of the accused. Commonwealth v. Cox, 728 A.2d 923, 931 (Pa. 1999). Moreover, reversible error exists only if the unavoidable effect of the supposedly offending language would prejudice the jurors and form in their minds a fixed bias and hostility towards the defendant such that they could not weigh the evidence and render a true verdict. Id., citing Commonwealth v. Carpenter, 515 A.2d 531 (Pa. 1986).

(Continued)

Exhibit "D". This list does not satisfy the above-mentioned standards for showing counsel's ineffectiveness for not calling these alleged witnesses.

Contrary to Appellant's assertions, the evidence supported the prosecutor's references to the fire having been started by gasoline contained in an antifreeze jug. A neighbor, Sharon DeFazio, testified that the victims kept gasoline for their lawnmower in an antifreeze jug in the garage. An assistant fire marshal who investigated the scene testified that the fire was incendiary in origin and that the antifreeze jug found in the basement of the victims' home where the fire damage was heaviest had a "heavy odor of gasoline." N.T. 10/26/90 pp. 447-48. This testimony was sufficient to support the prosecutor's arguments that Appellant had used gasoline contained in an antifreeze jug to set the fire in the basement.[10] Therefore, appellate counsel was not ineffective for failing to raise this issue on direct appeal.[11]

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[10] The sole basis for Appellant's claim that the prosecutor committed misconduct in arguing to the jury that the fire had been deliberately set by using gasoline contained in an antifreeze jug is the testimony from Joseph McBride, a civilian chemist for the Philadelphia Police Department, who stated that a five milliliter sample of liquid obtained from the victims' home tested negatively for the presence of gasoline. Appellant ignores other testimony from Mr. McBride that carpet debris from the victims' home tested positively for gasoline. N.T. 10/29/90 p. 643. Although this testimony upon which Appellant relies may weigh against the Commonwealth's proof before the jury, we have already noted that other evidence that the fire was started by gasoline contained in an antifreeze jug supported the prosecutor's closing argument, which did not, therefore, constitute prosecutorial misconduct. Appellant repeats this meritless assertion in his ninth appellate issue, arguing that the prosecutor committed misconduct by making any references during the trial to the fire having been started by means of gasoline from an antifreeze jug. Brief of Appellant, pp. 48-50. We similarly reject this claim.

[11] In a related issue, Appellant claims prosecutorial

(Continued)

Appellant also claims ineffective assistance of counsel for failing to raise issues of prosecutorial misconduct for comments made by the prosecutor during closing argument concerning statements made by Appellant demonstrating his intent to burn down his family's house, and regarding the relationship of Appellant to the Commonwealth's witness, Tim O'Reilly.[12] The first objection made by Appellant is to the following statement from the prosecutor during closing: "Remember, he said I'm gonna roast them, I'm gonna burn the house down. I'm gonna take them to hell with me if I decide to kill myself, too . . . ." N.T. 10/31/90 p. 889. The next objection Appellant makes is to the prosecutor's characterization of Tim O'Reilly as Appellant's "best friend."

The essence of finding prosecutorial misconduct is that the prosecutor, a person who holds a unique position of

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(Continued)

misconduct and alleges that the Commonwealth knowingly used perjured testimony at trial. Brief of Appellant, pp. 37-40. PCRA counsel declined to raise this issue as being without merit, and Appellant presently challenges PCRA counsel's ineffectiveness for failing to raise it. No relief is due. Again based on Mr. McBride's testimony that a liquid sample taken from the scene tested negatively for the presence of gasoline, Appellant contends that all trial testimony concerning the presence of gasoline odors was necessarily perjured. Appellant offers nothing to support this claim other than his own wild conjecture, and we will not find counsel ineffective for refusing to advance this claim.

[12] Appellant also claims that the prosecutor improperly vouched for the credibility of a witness by purportedly contending during closing argument that Appellant's sister, Joan Pierce, was Appellant's "closest associate" while he stayed with her in California. Brief of Appellant, p. 42. We have reviewed the prosecutor's closing argument and can find no such statement.

trust in our society, has abused that trust in order to prejudice and deliberately mislead the jury. Commonwealth v. Pierce, 645 A.2d 189, 197 (Pa. 1994). A prosecutor must argue only those inferences that reasonably derive from the evidence at trial. Commonwealth v. Miles, 681 A.2d 1295, 1301 (Pa. 1996), cert. denied, 520 U.S. 1187 (1997). Moreover, this Court has held that as long as there is a reasonable basis in the record for the comments, we will permit vigorous prosecutorial advocacy. Id. at 1302. Finally, we will not reverse based on a prosecutor's comments unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict. Commonwealth v. Simmons, 662 A.2d 621, 639 (Pa. 1995), cert. denied, 516 U.S. 1128 (1996).

Here, the comments by the prosecutor do not entitle Appellant to relief. In stating to the jury that Appellant had stated "I'm gonna roast them," the prosecutor was attempting to paraphrase the testimony of Tim O'Reilly, who testified that Appellant told him "[Appellant] had nothing to live for, and he was either gonna kill himself or he said he was gonna kill himself and take his parents with him. I think the exact words were to hell with them." N.T. 10/29/90 p. 500. O'Reilly had also testified that Appellant had told him "three or four times . . . at length and seriously" that he intended to burn his parents' house down. N.T. 10/29/90 p. 535. Although the record does not support the prosecutor's specific attribution of the term "roast" to Appellant, we conclude that this comment, when viewed in the entire context of the incriminating statements regarding Appellant's intention to burn down his parents' house, did not prejudice Appellant nor form in the minds of the jury a fixed hostility and bias against him. Finally, the prosecutor's reference to Tim O'Reilly as Appellant's "best friend" was a fair inference

from O'Reilly's testimony that he and Appellant had been friends for twenty-two years and that Appellant stayed with O'Reilly after he left his parents' residence. Accordingly, here also Appellant's claims of ineffective assistance of counsel fail.

4. Failure to Challenge Witnesses' Identifications

Appellant claims that appellate counsel was ineffective for failing to argue trial counsel's ineffectiveness for not raising a due process claim regarding the identification testimony of three witnesses. First, Appellant contends that the trial court should have suppressed the identification testimony of Harry Espenshade (Espenshade) and Randy Zehnder (Zehnder) as the product of an unnecessarily suggestive description of the suspect that these witnesses heard on the police radio. Second, Appellant contends that Police Sergeant Richard Shanfield's (Shanfield) encounter with Appellant at the police station on the night of the incident tainted his subsequent identification testimony.

Whether a pretrial identification is to be suppressed as unreliable and, hence, violative of due process, is determined from the totality of the circumstances. Commonwealth v. Sutton, 436 A.2d 167, 169 (Pa. 1981). A pretrial identification will not be suppressed as violative of due process rights unless the facts demonstrate that the identification procedure was so infected by suggestiveness "as to give rise to a substantial likelihood of irreparable misidentification." Commonwealth v. Sample, 468 A.2d 799, 801 (Pa. Super. 1983) (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)). Even where a pretrial identification is tainted by impermissibly suggestive pretrial procedures, the subsequent in-court identification will be admissible if there exists an independent basis for the identification. Commonwealth v. Abdul-Salaam, 678 A.2d 342, 349 (Pa. 1996), cert.

denied, 520 U.S. 1157 (1997). The factors to consider when determining whether an independent basis exists for the identification are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. Id., citing Commonwealth v. Carter, 643 A.2d 61, 71 (Pa. 1994).

Appellant's objection to the admission of testimony from Espenshade and Zehnder is without merit. Espenshade testified that he and Zehnder were walking towards the fire location when he saw a man with dark hair, wearing a flannel shirt, who was running near the scene. He stated that the man had a moustache and was approximately 5'10" tall and weighed 170 pounds. Espenshade testified that he witnessed the man for about ten to fifteen seconds. He and Zehnder told a nearby police officer that the house was on fire. The police detained Espenshade and Zehnder in a police car for over an hour. While in the police vehicle, Espenshade testified that he heard a description of the suspect the police were looking for in connection with the fire as a "white male wearing dark clothes." After his release from the police vehicle, Espenshade saw the same individual he had previously witnessed running near the fire location walking near the scene. At the preliminary hearing and at trial, he identified Appellant as the man he had seen fleeing from the fire scene. Under these circumstances, we see nothing in this identification of Appellant or in the report that Espenshade heard over the police radio as unduly suggestive such that Espenshade's identification of Appellant was unreliable. Accordingly, counsel was not ineffective for not pursuing this claim.

Similarly, Zehnder testified that he witnessed the same individual fleeing the scene whom Espenshade saw, and also admitted to hearing a police radio description of a suspect, but he could not recall the particulars of that description. Zehnder testified that he knew Appellant from the neighborhood and was able to identify him at the pretrial suppression hearing and at trial as the man he witnessed running from the scene. We find nothing in Zehnder's hearing of a police radio report as involving a suggestive identification and do not find Zehnder's pretrial identification of Appellant to be violative of Appellant's due process rights. Counsel will not be deemed ineffective for not raising this issue.

Finally, Appellant contends that Police Sergeant Shanfield's encounter with Appellant at the police station's homicide unit was unduly suggestive and tainted Shanfield's subsequent identification testimony. Shanfield testified that he was driving very slowly near the fire scene when an individual ran in front of his car. Shanfield testified that the individual was a white male with shaggy hair, some facial hair, and was wearing dark clothing. That individual, whom Shanfield identified at the preliminary hearing, pretrial suppression hearing and at trial as Appellant, ran approximately fifteen feet in front of Shanfield's vehicle. Shanfield was able to view Appellant for about five to ten seconds before Appellant ran away. Two and a half-hours after this incident, Shanfield reported to the homicide unit at the Philadelphia Police Administration Building to give a statement. While passing by one of the interview rooms, Shanfield saw Appellant sitting alone and recognized Appellant as the individual who had run past his car.

We do not believe that this encounter with Appellant at the police station tainted the reliability of Shanfield's testimony. The encounter between Shanfield and Appellant was

inadvertent and not an attempt to conduct a one-on-one identification lineup. Where a spontaneous identification of a suspect by a witness is not the product of police contrivance, the identification does not violate due process. See Commonwealth v. Wilcox, 392 A.2d 1294, 1297 (Pa. 1978); Commonwealth v. White, 290 A.2d 246, 252 (Pa. 1972). Further, Shanfield had sufficient opportunity to view Appellant at the scene such that his subsequent identification of Appellant was not unreliable. Counsel was not ineffective for refusing to pursue this issue.

5. Failure to Request Mercy-Dispensing Instruction

Next, Appellant claims appellate counsel was ineffective for not challenging trial counsel's ineffectiveness for failing to request a mercy-dispensing jury instruction during the guilt phase of Appellant's trial. In essence, Appellant claims that he was entitled to an instruction that the jury could acquit him of any degree of murder or manslaughter regardless of the facts proven and the elements of the crimes as instructed by the trial court. This claim is completely without merit. Appellant cannot claim entitlement to a jury instruction that has no basis in the evidence presented at trial. See Commonwealth v. Carter, 466 A.2d 1328 (Pa. 1983) (defendant not entitled to unreasonable belief voluntary manslaughter instruction where no evidence supported such charge). Appellate counsel was not ineffective for refusing to pursue this issue.

6. Failure to Object to Conclusions of Medical Examiner as to Cause of Death

In another layered claim of ineffective assistance of counsel, Appellant argues that trial counsel was ineffective for not objecting to the testimony of Dr. Bennett Preston, the Assistant Medical Examiner, that the victims' deaths were

homicides. On direct examination, Dr. Preston, a forensic pathologist, testified that the cause of the deaths of Anna Hayes and Mary Pierce was smoke and soot inhalation, and that George Pierce died from "smoke and soot inhalation and thermal body burns complicated by bronchopneumonia." N.T. 10/26/90 p. 384. When questioned by the prosecutor concerning the manner of death, Dr. Preston testified that the victims had died in a homicide from an arson fire. Dr. Preston explained that the basis for his opinion as to the manner of death was information he obtained from the fire marshal regarding the cause of the fire and that forensic pathologists routinely rely on this type of information when investigating deaths caused by fires to distinguish accidents from homicides. Trial counsel did not object to this testimony, and Appellant presently claims that prior counsel were ineffective for not arguing that Dr. Preston's testimony as to the manner of death was inadmissible and prejudicial.

We disagree. A medical expert is permitted to express opinion testimony on medical matters based, in part, on reports of others which are not in evidence, but which the medical expert customarily relies upon in the practice of his or her profession. Commonwealth v. Elliott, 700 A.2d 1243, 1252 (Pa. 1997), cert. denied, 524 U.S. 955 (1998); Commonwealth v. Chambers, 599 A.2d 630, 639 (Pa. 1991). Here, Dr. Preston testified that a conclusion regarding the manner of death is a routine part of his investigations and that forensic pathologists, when investigating deaths caused by fires, rely on the reports of the fire marshal as to whether the fire was deliberately or accidentally set. N.T. 10/26/90 pp. 375-76. Additionally, the trial court avoided any potential prejudice from Dr. Preston's testimony by immediately giving a clear instruction that reminded the jury that it was their function to determine whether the deaths were homicides:

> THE COURT: Members of the jury, the testimony as to the manner of death whether it is a homicide or not is for you and you alone, and although the doctor is permitted to testify to that, that it is in conjunction with his report, it is not a determination that it was, indeed, homicide. That's for you to decide and you alone.

N.T. 10/26/90 p. 376. Consequently, no relief is due on this claim.

7. Selection of Juror Number Two

Appellant next contends that appellate counsel was ineffective for failing to argue trial counsel's ineffectiveness for not using a peremptory strike to remove a prospective juror from the venire. Appellant objects to the selection of Howard Peltzman as a juror and argues that Mr. Peltzman indicated during voir dire that he had formed an opinion of Appellant's guilt. Although he admittedly acquiesced in trial counsel's decision not to strike Mr. Peltzman from the venire, Appellant now maintains that he was "overborne" by trial counsel.

No relief is due on this claim, as Appellant cannot demonstrate how he was prejudiced by the selection of Mr. Peltzman as a juror. Although Mr. Peltzman admitted that he had read about the incident in newspaper articles at about the time that it occurred and that he believed these articles suggested Appellant's guilt,[13] he later [**220] testified that

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[13] Appellant relies on the following exchange during voir dire: "THE COURT: You mean these papers indicated to you,

(Continued)

he had no fixed opinion regarding the guilt or innocence of the accused and would be able to follow the instructions of the court. N.T. 10/17/90 pp. 50-51. Absent evidence that Mr. Peltzman was incapable of setting aside preconceived impressions or opinions about the case, Appellant cannot show how the selection of Mr. Peltzman deprived him of a fair trial. See Commonwealth v. Tressler, 584 A.2d 930 (Pa. 1990). Therefore, Appellant cannot show that prior counsel were ineffective for failing to raise this issue.

8. Failure to Object to Prosecutor's Examination of Witnesses

In this issue, Appellant claims that prior counsel were ineffective for failing to object to the alleged leading of witnesses by the prosecutor. Specifically, Appellant contends that the prosecutor nodded her head to indicate "yes" and "no" answers to witnesses whom she was questioning and that the prosecutor improperly communicated with witnesses Espenshade and Zehnder during a break in the trial. With regard to the leading of witnesses, the record does not support Appellant's claim. When Appellant complained during the trial that the prosecutor was leading witnesses' testimony by her head movements, the trial court rejected that assertion and stated:

> THE COURT: With respect to [the prosecutor's] conduct in questioning the witnesses, that's up to the Court to determine when and if there's an appropriate objection, and I have

(Continued)

from reading it, that the person who was arrested was the person who committed the crime. Is that what you are saying? [Mr. Peltzman]: That's correct or at least that's the way I interpreted it." N.T. 10/17/90 pp. 44-45.

> seen nothing to indicate that [the prosecutor] has acted other than in an appropriate way and when she has led the witness, there's been an objection, and I have ruled on it.

N.T. 10/26/90 pp. 364-65. Furthermore, Appellant fails to identify those witnesses whose testimony the prosecutor supposedly led by her head nodding. This is insufficient to support a claim of ineffective assistance of counsel for failing to raise this issue. Regarding the prosecutor's communication with Espenshade and Zehnder during a break in the trial, the prosecutor explained when Appellant made this complaint at the hearing on his post-verdict motions that she was handing them their witness fee slips. N.T. 10/22/91 p. 9. Appellant engages in nothing more than speculation that the prosecutor's conduct was improper and offers nothing to contradict the prosecutor's assertion that her limited communication was entirely proper. Such speculation cannot support a claim for ineffective assistance of counsel for not pursuing this matter. See Commonwealth v. Pursell, 724 A.2d 293, 314 (Pa. 1999); Commonwealth v. Morris, 684 A.2d 1037, 1045 (Pa. 1996), cert. denied, 521 U.S. 1106 (1997).

9. Failure to Object to Use of Diagram by Witness

The next layered ineffective assistance of counsel claim raised by Appellant concerns prior counsel's failure to allege prosecutorial misconduct for violation of a sequestration order by the use of a diagram of the crime scene by witnesses Espenshade and Zehnder during their testimony. Appellant contends that Zehnder was able to see Espenshade's testimony because Espenshade, who testified first, had marked his initials on the diagram indicating where he was located and marked the letter "X" to show where

Appellant was located when he saw Appellant on the night of the fire. Zehnder used the same diagram containing Espenshade's initials and markings to illustrate where he had seen Appellant on the night of the fire. The use of the diagram by the prosecutor in this fashion, according to Appellant, amounted to a deliberate violation of the sequestration order by permitting Zehnder's testimony to be influenced by Espenshade's initials and markings, and prior counsel were ineffective for not raising this issue.

We must reject this claim because the record establishes that Appellant suffered no prejudice from the witness' use of this diagram. Zehnder was not told what the markings on the exhibit meant prior to his testimony. Further, Appellant cannot show that Zehnder altered his testimony as a result of viewing the marked-up diagram; indeed, his testimony at trial appears to be consistent with his testimony at the suppression hearings. See N.T. 10/16/90 pp. 77-93. Because Appellant cannot demonstrate prejudice from counsels' failure to pursue this issue, we will not grant him relief on this claim.

B. Claims of Ineffective Assistance of PCRA Counsel

Appellant raises various claims of ineffective assistance of PCRA counsel for failing to include certain issues in the PCRA proceedings or to address them in a Finley letter.[14] The first complaint Appellant makes of PCRA counsel's performance concerns the failure to include numerous claims that Appellant requested that PCRA counsel raise that were not raised. These issues are contained in a handwritten

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[14] Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988).

document entitled "Post Verdict Motion Supplement" attached as Exhibit "A" to Appellant's brief. This document consists of a list of 45 main issues with 99 sub-issues. Other than listing these issues and broadly asserting that PCRA counsel was ineffective for not raising them, Appellant does not develop these claims with any analysis of the record or specific allegations of how the failure to present these claims prejudiced him. Absent a demonstration of prejudice, Appellant cannot prevail on a claim for ineffective assistance of counsel and no further inquiry into the claim is warranted. See Commonwealth v. Fletcher, 750 A.2d 261 (Pa.), cert. denied, 531 U.S. 1035 (2000).

Similarly, Appellant claims PCRA counsel was ineffective for failing to raise issues that Appellant purportedly requested be included in the PCRA proceedings.[15] In none of these issues does Appellant demonstrate how the alleged errors deprived him of a fair trial, i.e., one whose result was not reliable. See Commonwealth v. Wallace, 724 A.2d 916, 921 (Pa. 1999) (in order to meet prejudice prong of the ineffectiveness standard, a defendant must show that there is a reasonable probability that, but for the act or omission, the outcome of proceeding would have been different).

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[15] These claims appear in Exhibit "C" to Appellant's brief. Most of these "claims": (1) relate to matters that have been previously addressed; (2) contain unfounded accusations of prosecutorial misconduct; (3) incorrectly contend that this Court misstated facts in our opinion on direct appeal; or (4) allege various unfounded due process violations. Attached to this Exhibit "C" to Appellant's brief is a handwritten document entitled "Additional Motions and Amendments to Foregoing Attached Motions for Removal of Counsel Due to Ineffectiveness on Appeal". This document lists 83 main issues and numerous sub-issues that Appellant presently asserts PCRA counsel was ineffective for failing to raise.

Consequently, there can be no finding of ineffective assistance of PCRA counsel for failing to raise issues where Appellant cannot show that he was prejudiced.

Additionally, Appellant argues that PCRA counsel violated the procedures for withdrawal from representation in collateral proceedings described in Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988) by not addressing the numerous issues that Appellant claims he asked PCRA counsel to raise in the petition.[16] Turner and Finley govern the withdrawal by counsel from representation in collateral proceedings where counsel determines that no meritorious issues exist. In this case, however, none of Appellant's three appointed PCRA counsel -- Mr. Siegel, Mr. Gelman, or Mr. Epstein -- sought to withdraw from representation on the grounds that there were no meritorious issues. Instead, counsel were permitted to withdraw when it became apparent that Appellant refused the further assistance of counsel and decided to proceed pro se. The trial court found, and we agree, that Appellant knowingly, voluntarily, and intelligently waived his right to counsel on appeal from the denial of his PCRA petition. Indeed, Appellant has obtained review by this Court of the numerous claims of ineffective assistance of PCRA counsel for failing to raise the issues Appellant sought to have included below, which is the proper avenue when counsel has not withdrawn on the grounds that the petition lacks merit, but has chosen to limit the issues presented in the PCRA proceedings. See Commonwealth v. Albrecht, 720 A.2d 693, 701 (Pa. 1998) (relief available to

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[16] Appellant raises this objection with respect to Mr. Siegel's representation of him prior to the dismissal of his petition and Mr. Gelman's representation of him subsequent to the filing of this appeal.

an appellant for a claim that PCRA counsel's judgment was exercised in a legally ineffective manner is an evaluation of the claims prior counsel has forgone for a determination of ineffectiveness). Consequently, no relief is due on this claim.

Next, Appellant contends that PCRA counsel was ineffective for failing to request that Judge Savitt, who presided over Appellant's trial, recuse himself from hearing Appellant's PCRA petition on specific grounds alleged by Appellant.[17] Appellant raises three reasons for Judge Savitt's recusal: (1) the judge gave three allegedly erroneous jury instructions; (2) the judge could not impartially decide Appellant's ineffectiveness of counsel and prosecutorial misconduct claims because he had congratulated counsel on their performance at the close of trial; and (3) the judge could not rule fairly on claims related to trial court errors because they involved challenges to his decisions from Appellant's trial.

Recusal is required only where the party requesting recusal establishes that there is a substantial doubt as to the jurist's ability to preside impartially. Commonwealth v. Miller, 664 A.2d 1310, 1320 (Pa. 1995), cert. denied, 516 U.S. 1122 (1996) (citing Commonwealth v. Boyle, 447 A.2d 250, 252 (Pa. 1982)). In this case, none of the grounds that Appellant argues PCRA counsel should have raised required Judge Savitt to recuse himself. Contrary to Appellant's assertions, the jury instructions were not improper, as we have previously noted. Further, the comments by the judge on the performance of counsel at the close of Appellant's trial do not demonstrate an inability to decide Appellant's PCRA

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[17] The PCRA court denied Appellant's Motion for Recusal on October 19, 1995.

petition impartially. Finally, the fact that Judge Savitt presided over Appellant's trial and would be reviewing his previous rulings does not render him incapable of deciding Appellant's PCRA petition. Adverse rulings alone do not establish bias warranting recusal. Commonwealth v. Abu-Jamal, 720 A.2d 79, 90 (Pa. 1998), cert. denied, 120 S. Ct. 41 (1999). Moreover, it is generally preferable for the same judge who presided at trial to preside over the post-conviction proceedings since familiarity with the case will likely assist the proper administration of justice. Id. Because the grounds offered by Appellant for Judge Savitt's recusal are devoid of merit, we will not fault counsel for not advancing them.

Finally, Appellant argues that PCRA counsel was ineffective for not asking for reargument or reconsideration of the December 9, 1997 opinion of the trial court on the grounds that the opinion contained factual errors, which PCRA counsel should have sought to correct. Even assuming these allegations were true, Appellant does not explain how he was prejudiced by PCRA counsel's failure to request reconsideration of the opinion of the trial court. Based on our review of the dismissal of Appellant's petition by the PCRA court and of Appellant's allegations of error regarding that dismissal, we cannot see how Appellant suffered any prejudice in this regard and will not find PCRA counsel ineffective on this basis.

III. CONCLUSION

We affirm the denial of Appellant's post-conviction petition. We direct the Prothonotary of the Supreme Court to transmit the record to the Governor pursuant to 42 Pa.C.S. § 9711(h).

Mr. Justice Castille files a Concurring Opinion.

Mr. Justice Nigro concurs in the result.

[J-95-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	No. 207 Capital Appeal Docket
	:	Appeal from the Order entered December 7, 1997 in the Court of
v.	:	Common Pleas, Philadelphia County, Criminal Division at No. 8908-1312-1321 and 9008-0323-0327.
MICHAEL PIERCE, Appellant	:	SUBMITTED: April 5, 2000

CONCURRING OPINION

MR. JUSTICE CASTILLE
DECIDED: December 21, 2001

I join the majority opinion. I write separately only to further address appellant's claims that his direct appeal counsel was ineffective.

As the majority notes, appellant's claims of trial court error, as well as his claims alleging that trial counsel was ineffective, are waived under the PCRA since appellant, who was represented by counsel other than trial counsel on post-verdict motions and direct appeal, could have raised these claims on that appeal. Thus, the only claims available to appellant on this *pro se* appeal are his "layered" claims

sounding in ineffective assistance of direct appeal counsel, as well as his claims alleging that PCRA counsel was ineffective. In my recent concurring opinion in Commonwealth v. Williams, 782 A.2d 517 (Pa. 1991), I addressed at some length the "substantive contours of claims of appellate counsel ineffectiveness." Id. at 534-37 (Castille, J. concurring). Here, the majority properly concludes that appellant's underlying claims lack substantive merit. Appellate counsel cannot be deemed ineffective for failing to raise these meritless claims in addition to, or instead of, the claims counsel forwarded to this Court. Commonwealth v. Peterkin, 649 A.2d 121, 128 (1994), cert. denied, Peterkin v. Pennsylvania, 515 U.S. 1137 (1995); Commonwealth v. Tarver, 420 A.2d 438, 438 (Pa. 1980). Accordingly, I join fully in the majority's determination that appellant is not entitled to PCRA relief.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	AUGUST TERM, 1989 NO. 1315, 1/1
v.	:	AUGUST TERM, 1989 NO. 0325, 1/1
	:	SUPERIOR COURT
MICHAEL PIERCE	:	NO.

OPINION

SAVITT, J. DECEMBER 9, 1997

FACTS AND PROCEDURAL HISTORY

At approximately 3:00 a.m. on July 10, 1989 petitioner's sister, Joan Pierce, awoke to the smell of gasoline in her parents' home in the 3100 block of Byberry Road in Philadelphia. From the top of the stairs she observed the living room sofa on fire and went downstairs with her father, George Pierce, to attempt to extinguish the fire. After unsuccessfully attempting to extinguish the fire, George Pierce opened the door to the basement, flames erupted through the door frame and both he and petitioner's sister fled the house.

Once outside, petitioner's father looked up to see petitioner's mother at her second floor window calling for help. The father ran back into the house in an attempt to help her but was driven back by smoke and flames and severely burned. Firemen arrived too late to save the petitioner's mother and grandmother who died in the blaze. His father

was hospitalized with burns over forty percent of his body and died from them some six months later.

Petitioner was tried by this court and a jury and found guilty of three counts of first degree murder, arson, recklessly endangering another person and risking catastrophe on October 31, 1990. Following a penalty stage hearing the jury sentenced the petitioner to death on each count of first degree murder.

Following trial, this court granted petitioner's pro se petition to remove trial counsel and new counsel was appointed to represent him. Hearings were held on petitioner's post trial ineffectiveness claims, post trial motions were denied and petitioner filed a direct appeal to the Pennsylvania Supreme Court which affirmed the judgements of sentence on July 1, 1994.

The instant petition was fled on October 5, 1994, counsel was appointed and filed an amended petition on June 28, 1995 and also a motion to recuse this court which was heard and denied on October 19, 1995. Petitioner subsequently filed a supplemental amended petition and a second supplemental petition and the Commonwealth filed a motion to dismiss. Following a hearing on July 30, 1997 both sides rested.

OPINION

Petitioner, Michael Pierce, here argues that trial counsel was ineffective at the trial stage for failure to present psychiatric testimony, for failing to present certain witnesses and for selecting juror Howard Peltzman over petitioner's objection. He further argues that trial counsel was ineffective for not objecting to certain remarks by the prosecutor, for not objecting to the court's charge on arson and for not

objecting to the testimony of the medical examiner concerning the manner of death. Finally, petitioner argues that the court erred in not suppressing certain identification testimony. Petitioner further argues that appellate counsel were ineffective for not preserving these issues on appeal.

With respect to the penalty stage of the proceeding, petitioner argues that trial counsel was ineffective for not presenting certain witnesses, for not presenting psychiatric testimony and for not requesting that the court give a mercy instruction on the mercy dispensing power of the jury and that appellate counsel was ineffective for not preserving these issues.

A petitioner is not entitled to PCRA review on an issue that has been previously litigated. 42 Pa.C.S.A. §9543(a)(3). An issue has been previously litigated if: "(1) it has been raised in the trial court, the trial court has ruled on the merits of the issue and the petitioner did not appeal; (2) the highest appellate court in which Petitioner could have had review as a matter of right has ruled on the merits of the issue; or (3) it has been raised in and decided in a proceeding collaterally attacking the conviction or sentence." 42 Pa.C.S.A. §9544(a).

With respect to the issue of ineffectiveness, counsel is presumed to be effective and the defendant has the burden of proving ineffectiveness. Commonwealth v. Williams, 524 Pa. 218, 570 A.2d 75 (1990); Commonwealth v. McNeil, 506 Pa. 607, 587 A.2d 802 (1985); Commonwealth v. Stinnet, 356 Pa.Super. 83, 514 A.2d 154 (1986). In order to carry this burden the defendant must first show that the claim which counsel failed to raise has arguable merit and that counsel's failure to raise it was without a reasonable basis which would effectuate the defendant's best interests.

Strickland v. Washington, 466 U.S. 688 (1984); Commonwealth v. Basemore, 525 Pa. 512, 582 861 (1990); Commonwealth v. Buel, 510 Pa. 363, 508 A.2d 1167 (1986); Commonwealth ex rel Washington v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967). Second, the defendant must show that counsel's ineffectiveness worked to his prejudice. Strickland v. Washington, supra; Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987), Commonwealth v. Buel, supra; Commonwealth v. Garvin, 355 Pa. Super. 560, 485 A.2d 36 (1984). In order to show prejudice the defendant must demonstrate that there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the trial could have been different. Strickland v. Washington, supra, Commonwealth v. Pierce, supra.

To establish that counsel was ineffective for not calling certain witnesses, the defendant must show not only that counsel was aware of their existence and has no reasonable basis for failing to call them, but also that their testimony could have been beneficial under the fact's and circumstances of the defendant's case. Commonwealth v. Jasper, 526 Pa. 497, 587 A.2d 705 (1991); Commonwealth v. McNeil, supra, Commonwealth v. Leonard, 499 Pa. 357, 453 A.2d 587 (1982). Most important, the defendant must show that he was prejudiced by counsel's failure to call these witnesses, i.e., that it is reasonable likelihood that the decision reached by the jury would have been different had they been called to testify. Strickland v. Washington, supra; Commonwealth v. Jasper, supra; Commonwealth v. Pierce, supra.

Moreover, pursuant to the PCRA Act petitioner must show by a preponderance of evidence that counsel's ineffectiveness so undermined the truth determination that the result of his trial was inherently unreliable. Commonwealth v. Szuchon, 534 Pa. 483, 633 A.2d 1098 (1993);

Commonwealth v. Pitts, 397 Pa.Super. 387, 581 A.2d 352 (1990).

The issue of trial counsel's ineffectiveness for allegedly not seeking to have petitioner psychiatrically evaluated and presenting psychiatric testimony has been previously litigated in that it was raised in post sentence motions and addressed by the Pennsylvania Supreme Court which found that trial counsel could not be held to be ineffective for not forcing petitioner to be psychiatrically evaluated when he refused to do so at the time of trial.

Further, prior to the instant PCRA hearings, petitioner was given another opportunity to be psychiatrically evaluated for the purpose of presenting psychiatric testimony both as to his state of mind at the time of the offense and as to the mitigating circumstances of extreme mental and emotional disturbance. 42 Pa.C.S.A. §9711 9(e)(2) and his inability to conform his conduct to the requirement of law. 42 Pa.C.S.A. §2711(c)(3). He again refused to be evaluated. He was questioned by this court about this decision and stated that he did not wish to be evaluated or to present evidence as to his mental capacity.

Accordingly, there is no merit to this issue and petitioner is not entitled to relief on this basis.

With respect to the selection of juror Howard Peltzman, there is no record evidence that petitioner disagreed with trial counsel concerning the selection of this juror and no showing that he was prejudiced by it. Accordingly, petitioner is not entitled to a new trial on this basis.

Petitioner has failed to carry the burden of showing that trial counsel was ineffective for not calling certain fact

or character witnesses because he has neither identified any of the witnesses who could have been called nor has he indicated the substance of their testimony. Accordingly, this claim has no arguable merit, counsel was not ineffective and petitioner is not entitled to a new trial on this basis.

With respect to prosecutorial misconduct, even improper remarks by a prosecutor will not result in a new trial absent a showing that the unavoidable effect of such remarks is to so prejudice the jury by forming in their minds fixed bias and hostility to the defendant that they could not weigh the evidence and render a true verdict. Commonwealth v. Faulkner, 528 Pa. 57, 595 A.2d 28, cert. denied, 112 S.Ct. 1630 (1992); Commonwealth v. Hardcastle, 519 Pa. 236, 546 A.2d 1101, cert. denied 493 U .S. 1093 (1990). The prosecutor may argue any legitimate inferences which arise from the evidence. Commonwealth v. Chester, 526 Pa. 578, 587 A.2d 1367, cert. [sic]

There is no merit to petitioner's claim that the prosecutor committed misconduct when she argued that the petitioner could have committed the crime because he knew that his parents kept gasoline in an anti-freeze container in the garage. The prosecutor's argument was based on the testimony of a neighbor that the victims kept gasoline for the lawnmower in an anti-freeze container in the garage, that a partially burned anti-freeze container was found by police after the fire and that the container smelled of gasoline. The prosecutor's argument was an inference based on the evidence, was not improper and petitioner's claim of misconduct has no arguable merit. Trial counsel was, therefore, not ineffective and petitioner is not entitled to a new trial on this basis.

Trial counsel was not ineffective because she did not object to the court's charge concerning culpability. The court charged the jury as follows:

> It will be your duty in this case to determine whether George Pierce, Mary Pierce, and Anna Hayes died as a result of injuries sustained in a fire which was started by this defendant and, if so, whether such killing amounted to murder of the first degree, murder of the second degree, murder of the third degree, voluntary manslaughter, or involuntary manslaughter.
>
> You cannot find the defendant -- you cannot find that the defendant killed any of these persons unless you are satisfied beyond a reasonable doubt that the defendant's conduct was the direct cause of their death.

Petitioner here claims that the phrase "in a fire which was started by this defendant" in the text of the charge indicated to the jury that the petitioner was the person who started the fire. Such a conclusion can be reached only by taking the phrase out of context as the petitioner has done. A reading of the entire charge makes it clear that the court instructed the jury that they must determine whether the petitioner caused the deaths by his conduct and whether he started the fire. Counsel cannot be found to be ineffective for not objecting to an appropriate instruction and petitioner is not entitled to a new trial on this basis.

There is no merit to petitioner's claim that trial counsel was ineffective for not objecting to the conclusion of the medical examiner concerning the manner of death of the victims. Following the testimony of the medical examiner that the manner of victim Anna Hayes was homicide the court instructed the jury as follows:

> Members of the jury, the testimony as to the manner of death and whether it is homicide or not is for you and you alone, and although the doctor is permitted to testify to that, that it is in conjunction with his report, it is not a determination that it was, indeed, homicide. That's for you to decide and you alone.
>
> You may proceed.

Thus, the jury clearly understood that the determination as to whether the manner of deaths of the victims was homicide was for them, Trial counsel was not ineffective and petitioner is not entitled to a new trial on this basis.

There is no basis for petitioner's argument that the prosecutor's references to gasoline as the accelerant used to start the fire were improper. The uncontradicted evidence was that an accelerant was used to start the fire and that the partially burned anti-freeze jug found in the basement of the house smelled of gasoline and that just such a jug of gasoline was kept in the garage. Under these circumstances there was no reason for trial counsel to object to the prosecutor's remarks.

Petitioner's allegations that the court erred in permitting the in-court identifications by Harry Espenshade, Randy

Zehnder and Sergeant Shanfield has no merit. With respect to Espenshade and Zehnder petitioner charges that their on the scene identifications were improper because they allegedly heard the police radio broadcast describing petitioner before they identified him on Byberry Road walking toward the scene of the crime. With respect to Sergeant Shanfield, petitioner argues that this identification was improper because the officer saw petitioner in an interview room at the Police Administration Building.

Whether or not a defendant is denied due process of law in the identification process must be determined on the basis of the totality of the circumstances surrounding the identification. Neil v. Biggers, 409 U.S. 188 (1972); Commonwealth v. Toro, 432 Pa.Super. 383, 638 A.2d 991 (1994). The linchpin in determining the admissibility of an identification is its reliability, which is determined by the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description, the level of certainty demonstrated at the confrontation and the time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98 (1977); Commonwealth v. Toro, supra. Suggestiveness, is but one factor to be considered in determining the reliability of the identification. Manson v. Brathwaite, supra; Commonwealth v. Toro, supra.

A review of the record of the suppression hearing shows that both Mr. Espenshade and Mr. Zehnder, who were walking together at about the time the fire was set, saw the petitioner for fifteen seconds running from the scene of the fire in good lighting conditions and were able to accurately describe the petitioner, his clothing and his build to police. Further, Mr. Zehnder was previously acquainted with petitioner because he lived in the same neighborhood. Under

these circumstances it is clear that both witnesses' identifications at the fire scene were based on what they saw previously and not on what they heard on police radio.

Sergeant Shanfield testified at the suppression hearing that he saw petitioner for about ten seconds running away from the fire, and that the petitioner had turned his face to him when the sergeant shined his spotlight in his face. Further, the sergeant gave an accurate description of the petitioner prior to seeing him in the interview room and saw him there only two hours after the crime. Accordingly, it is clear that his identification was also based on his view of the petitioner at the time of the crime and not on the glimpse of him at the Police Administration Building.

Petitioner's claims concerning the prosecution's alleged coaching of her witnesses and to the use of a diagram have no merit and will not be discussed further here.

PENALTY STAGE

There is no merit to petitioner's claim that trial counsel was ineffective for not presenting psychiatric testimony in mitigation. The record shows that both at the time of trial stage and at the time of the Post Conviction Relief Act hearing, petitioner refused to cooperate in a psychiatric evaluation so that no psychiatric testimony could be presented at either proceeding. Accordingly, petitioner has failed to meet his burden of showing that this claim has arguable merit and he is entitled neither to a new trial nor to a new sentencing proceeding on this basis.

With respect to present counsel's argument that petitioner is too emotionally unstable to make the decision to forego psychiatric evaluation, petitioner was questioned by

this court about his reasons for this decision and gave cogent and reasoned replies indicating that he understood the purpose of and evaluation and the proposed testimony. Further, Dr. Alan Tepper testified at the July 30, 1997 hearing that he had spoken to Mr. Pierce on two occasions on the day of the hearing and that Mr. Pierce understood the nature of the proceedings, the options explained to him by Dr. Tepper and that he was competent to make a decision regarding the progress of his case. Under these circumstances, there is no showing that petitioner is too mentally impaired to make a knowing and [sic]

Petitioner's argument that trial counsel was ineffective for not requesting a mercy dispensing instruction has no basis in law. The Pennsylvania Supreme Court has held that such instruction would interject arbitrariness and capriciousness into the capital sentencing process. Commonwealth v. Hill, 542 Pa. 291,666 A.2d 642 (1995); Commonwealth v. Young, 536 Pa. 57, 637 A.2d 1313 (1993). Counsel cannot be held to be ineffective for not asserting a meritless claim. Accordingly, petitioner is not entitled to a new sentencing hearing on this basis.

Finally, petitioner's claim regarding counsel's ineffectiveness for not calling certain witnesses has been addressed previously and will not be further discussed here.

For the reasons set forth herein the Post Conviction Relief Act Petition is dismissed.

/s/ Savitt

J.

J-203-1993
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 20 Capital Appeal Docket
	:	
Appellee	:	Direct Appeal from the Judgments of Sentence entered on November 1, 1990, by the Court of Common Pleas of
V.	:	Philadelphia County, Criminal section at Nos. 1315, 1316, 1319, 1320 and 1321, August term, 1989, and Nos. 325 and 327, August Term, 1990.
MICHAEL PIERCE,	:	
	:	ARGUED:
Appellant	:	October 18, 1993

OPINION OF THE COURT

MR. JUSTICE CAPPY DECIDED: July 1, 1994

This is a direct appeal from three concurrent judgments of sentence of death. Appellant was convicted of three counts of murder in the first degree as a result of the arson which caused the deaths of his mother, father and grandmother. In addition, the appellant was sentenced to concurrent terms of imprisonment of ten to twenty years for

arson,[1] ten to twenty years for aggravated assault,[2] two and one-half to five years for recklessly endangering another person,[3] and, three and one-half to seven years for risking a catastrophe.[4]

In all cases where this Court affirms the imposition of a sentence of death we must conduct an independent review to determine if the evidence is sufficient to sustain the underlying conviction for murder in the first degree. Commonwealth v. Green, ___ Pa. ___, ___ A.2d ___ (1994); Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), cert. denied, 461 U.S. 970 (1983), reh'g denied, 463 U.S. 1236 (1983). In order to prove murder of the first degree the Commonwealth must show that a human being was unlawfully killed, that the accused committed the killing, and that the killing was done in an intentional, deliberate and premeditated manner. Commonwealth v. Mitchell, 528 Pa. 546, 599 A.2d 624 (1991).

The evidence presented in the instant case established that at approximately 3:00 a.m. on the morning of July 10, 1989, Joan Pierce, the appellant's sister, was awakened by the strong smell of gasoline. Joan woke her father, George Pierce, and the two of them descended the stairs to discover the living room sofa on fire. George Pierce opened the basement door and flames then shot forth, forcing them to flee the

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[1] 18 Pa.C.S. § 3301.

[2] 18 Pa.C.S. § 2702.

[3] 18 Pa.C.S. § 2705.

[4] 18 Pa.C.S. § 3302.

house. George re-entered the house in an attempt to rescue his wife and mother-in-law. George was unable to reach the stairs and collapsed inside. He was pulled out of the flaming building by neighbors who had been awakened by the fire.

George was taken from the scene to a hospital where he was treated for burns and smoke inhalation. Eventually he was transferred to a nursing home where he died six months later from complications due to smoke inhalation and bronchopneumonia. Appellant's mother, Mary Pierce and her ninety-five-year-old mother, Anna Hayes, were pronounced dead at the scene, with the cause of death later determined to be smoke and soot inhalation.

Upon investigation, experts from the Philadelphia fire department determined that the house burned down as a result of two separate fires, each having been deliberately set. The minor cause of the fire was found to have been living room sofa fire, which had been deliberately caused by an open flame being struck to the sofa. The major cause of the fire was found to have occurred in the basement by use of an accelerant. In the opinion of the fire department expert, a plastic anti-freeze bottle found on the basement floor had been filled with gasoline and deliberately set ablaze. In the opinion of the fire department investigator, the fire was the result of arson. The Pierce home was located at 3011 Byberry Road in Philadelphia and was physically located within a row of attached houses.

Sharon DeFazio, a neighbor, testified that she recognized the anti-freeze bottle as identical to the one George Pierce used as a container for gasoline for his lawnmower. Ms. DeFazio testified that Mr. Pierce had, shortly before the fire, given her a similar bottle filled with gasoline for her lawnmower, explaining that it was a safer container in which to keep gasoline. Ms. DeFazio also knew

where in his garage Mr. Pierce had kept his anti-freeze bottle containing gasoline. After the fire the anti-freeze bottle containing gasoline was not found in the Pierce garage.

In the garden behind the Pierce home a partial impression of a shoe print was discovered. Soil samples taken from the impression matched soil samples taken from the boots the appellant was wearing on the morning of the fire. A short distance away from and to the rear of the Pierce home, in an area of abandoned buildings, police discovered a partially used book of matches. The same type of matchbooks were found in a box of matchbooks at the home of Tim O'Rielly, where the appellant had been staying the week preceding the fire. The area containing the abandoned buildings was surrounded by a fence. On the top rail of the fence police discovered a soil sample which matched with the samples taken from the impression in the garden of the Pierce home and the sample from the appellant's boots.

At the time the fire was raging two teen-age boys were in the vicinity. The boys, Harry Espanshade and Randy Zehnder, approached two officers who were in the area on an unrelated matter and told them of the fire. The boys then began to walk through the woods towards the fire. As they were proceeding towards the fire they saw a man running away from the fire wearing jeans and a flannel shirt over a dark T-shirt. The boys immediately gave the police a description of the man. A few minutes later they again saw the man, this time without the flannel shirt. Two hours later while at the scene of the fire the boys saw the same man walking up the street toward the Pierce home. They identified him as the appellant.

Police Sergeant Shanfield was one of the officers who had been notified of the fire by Harry and Randy. As he was driving towards the Pierce house a man crossed in front

of his car and ran into the woods. As the man was running Sergeant Shanfield observed him stumble. Two and one-half hours later the Sergeant saw appellant at the police station and recognized him as the man he had seen running into the woods earlier. After appellant was arrested he was treated at the Philadelphia county prison for an injury to his toe.

Joan Pierce, appellant's sister, testified that her parents and appellant had a very strained relationship. Appellant had accused his parents of putting steroids in his food and depriving him of an inheritance from his Uncle Al. One week prior to the fire George and Mary had asked appellant to leave the family residence. Appellant had told Joan on many occasions that he hated their parents and threatened to kill them. Joan had seen appellant on Sunday night before the fire; he was wearing jeans, a dark T-shirt and a red flannel shirt and boots.

The week before the fire appellant had been living with his friend Tim O'Rielly and Tim's mother across the street from his parents' home. Mrs. O'Rielly testified that during that week appellant had told her that he would have no peace while his parents were alive. Appellant told Mrs. O'Rielly that he would get away with murdering his parents and would flee to Indonesia. Mrs. O'Rielly related this conversation to Joan Pierce.

Tim O'Rielly testified that during the week appellant stayed in his home, appellant repeatedly expressed the intent to kill his parents. Appellant told Tim of his intent to burn down the Pierce home and either commit suicide or escape to Indonesia. Appellant referred to his parents as "the enemy." Appellant explained that he would break his grandmother's neck so she wouldn't have to suffer, or be placed in a nursing home.

Appellant had a disagreement with Tim's mother and decided to leave the O'Rielly home the Sunday before the fire. Appellant left Tim's house about 11:00 p.m. Sunday night before the fire. At that time he was wearing a dark blue or green T-shirt, jeans and boots, and carrying a black and red flannel shirt Tim had given him.

At approximately 3:25 a.m. on the morning following appellant's departure from the O'Rielly home, Tim was in his kitchen when he noticed lights on in the Pierce garage and observed the garage door partially opened. About ten minutes later the lights went out and he heard a thud and then saw the garage door was closed. Two minutes thereafter he saw the fire erupt in the Pierce house. Tim called the police and went outside to help with the fire.

Appellant was arrested later that morning when he was observed walking towards the Pierce home.

The evidence linking appellant to the murder is circumstantial. In testing the sufficiency of the evidence where a conviction is based upon circumstantial evidence, we review the evidence along with all inferences and conclusions that reasonably and logically can be drawn therefrom. Commonwealth v. Gorby, 527 Pa. 98, 588 A.2d 902 (1991). Where the conviction for first degree murder is based upon arson the Commonwealth must first establish that there was a fire of incendiary origin and that the accused deliberately caused the fire. Commonwealth v. Cockfield, 465 Pa. 415, 350 A.2d 833 (1976). The Commonwealth must then establish that the fire was the cause of death. Commonwealth v. Smallwood, 497 Pa. 476, 442 A.2d 222 (1982). The Commonwealth has established its burden of proof in the instant case; the evidence was sufficient to

sustain appellant's convictions for murder in the first degree as to Anna Hayes, Mary Pierce and George Pierce.[5]

We now turn to the specific questions raised by appellant. Appellant raises five claims of ineffective assistance of trial counsel; these shall be addressed first. An allegation of ineffective assistance of counsel must be reviewed according to the following criteria:

> The standard to be applied in reviewing claims of ineffective assistance of counsel is well settled. The threshold inquiry in ineffectiveness claims is whether the issue/argument/ tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit; for counsel cannot be considered ineffective for failing to assert a meritless claim. Commonwealth v. Durst, 522 Pa. 2, 559 A.2d 504 (1989); Commonwealth v. Pursell, 508 Pa. 212, 495 A.2d 183 (1985). Once this threshold is met we apply the 'reasonable basis' test to determine whether counsel's chosen course was designed to effectuate his client's interests. If we conclude that the particular course chosen by counsel had some reasonable basis, our inquiry ceases and counsel's assistance is deemed effective. Commonwealth ex rel. Washington v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967). If we determine that there

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[5] Appellant does not challenge the sufficiency of the evidence as to his additional convictions on the charges of arson, aggravated assault, recklessly endangering another person and risking catastrophe.

> was no reasonable basis for counsel's chosen course then the accused must demonstrate that counsel's ineffectiveness worked to his prejudice. Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987). The burden of establishing counsel's ineffectiveness is on the appellant because counsel's stewardship of the trial is presumptively effective. Commonwealth v. McNeil, 506 Pa. 607, 487 A.2d 802 (1985).

Commonwealth v. Weiss, 530 Pa. 1, 5-6, 606 A.2d 439, 441 (1992).

The first four allegations of ineffectiveness charge trial counsel with having failed to properly prepare for the trial and penalty hearing. In allegations one and two, respectively, counsel is charged with having failed to obtain appellants' naval records and his employment records from the United States Postal Service. Appellant argues that his honorable discharge from the Navy and his steady employment at the post office would have been advantageous arguments in support of mitigation at the penalty stage. Counsel testified at the hearing on post-trial motions that she had made efforts to obtain these records and that appellant refused to sign releases which would have enabled her to obtain the service and employment records. Appellant now claims that counsel was ineffective for not forcing his hand and seeking a court order which would have compelled disclosure of these records. Trial counsel testified that she considered seeking a court order but decided against it because, if the records were damaging to appellant, procuring them by court order would have made them accessible to the prosecution.

Trial counsel cannot be deemed ineffective for failing to override the decision of her client. Further, counsel's decision not to seek the records by court order was reasonable as it precluded the prosecution from obtaining possibly damaging information. The fact that the records as revealed were not damaging to appellant does not make counsel's decision unreasonable.[6] As we find counsel's decision reasonable, our inquiry ends. Counsel was not ineffective for failing to compel production of either appellant's naval discharge records, nor his employment records from the United States Postal Service. See Washington v. Marony, supra.

Appellant next argues that trial counsel was ineffective for failing to obtain an arson expert for the defense. Trial counsel testified that her strategy was to dispute the circumstantial evidence connecting appellant to the crime, not to dispute that the fire had been deliberately set. In fact in the argument to this court appellant does not contest that the fire was deliberately set. Rather, appellant argues that an arson expert would have been able to establish that the fire in the living room would not have burned down the house, and if George Pierce had not opened the basement door, that fire would not have spread. Appellant asserts that the fires were intended to frighten his parents, not kill them, and he believes an arson expert would have been able to bolster this proposition.

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[6] The naval records did indicate a few blemishes, although appellant was honorably discharged. The postal records also indicate various complaints and disciplinary actions during appellants' six years at the post office. The weight to be given the records, had they been presented, would certainly have been a matter for the jury; however, the records are not strongly indicative of good character as is now implied by appellate counsel in his brief.

Appellant's claim is absurd. The fires were deliberately set, that is arson. Commonwealth v. Leslie, 424 Pa. 331, 227 A.2d 900 (1967). Appellant cannot minimize the consequences of his actions by arguing that although he deliberately set the fires, if George Pierce bad not opened the basement door, the fire would not have spread. Counsel was not ineffective for failing to engage an arson expert to pursue this meritless strategy.[7] Commonwealth v. Durst, supra.

Next, appellant asserts that trial counsel was ineffective for failing to present psychological testimony as to appellant's mental health and the effects of his alcohol and drug abuse. Appellant argues that trial counsel should have recognized that there was something critically wrong with appellant's thought process and forced appellant, against his own wishes, to present psychological evidence of emotional and mental disturbance in mitigation at the penalty phase. Trial counsel testified at the hearing on post-trial motions that she requested appellant submit to psychological and psychiatric interviews prior to trial and that appellant vehemently refused to cooperate. In fact at one of the hearings on post-trial motions (hearings were held on four separate dates) appellant testified that he had dismissed his first court appointed attorney over the issue of psychiatric evaluations. Appellant emphatically stated that there was nothing wrong with him and that he would not cooperate with preparation of psychological or psychiatric testimony. An accused cannot refuse to cooperate with counsel in preparation of a particular trial strategy and then argue counsel's ineffectiveness for failing to pursue that course of action. See Commonwealth v. Szuchon, 506 Pa. 228, 484 A.2d 1365 (1984)

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[7] In fact, at the post-trial hearing, the arson expert called by appellate counsel agreed with the Commonwealth's expert that the fire was deliberately set and that gasoline was the accelerant.

(a defendant must be prepared to accept the consequences of his obstinance). Counsel was not ineffective for failing to produce expert testimony on the issue of appellant's mental state.

The final ineffectiveness claim is that trial counsel erred in failing to object to the testimony of appellant's aunt, Helen Tarsi, which occurred in violation of the trial court's sequestration order. Prior to Ms. Tarsi's being called, trial counsel did object on the basis that Ms. Tarsi had been in the courtroom in violation of the sequestration order.[8] This objection was overruled by the trial court. The discussion between counsel and the court was interrupted so that trial counsel could explain the court's ruling to appellant. Appellant then stated he had no further objection to Ms. Tarsi's testifying; rather he expressed concern that it would cause Ms. Tarsi to become upset if forced to testify. Accordingly, appellant's claim as to trial counsel's failure to object is incorrect.

Additionally, appellant claims counsel was ineffective for failing to object to the substance of Ms. Tarsi's testimony. Earlier in the trial Joan Pierce had testified that one of the reasons appellant hated his parents was his belief that they had stolen his inheritance from Uncle Al, Ms. Tarsi's husband. Ms. Tarsi was called to testify that her husband died intestate and all property they owned was held in the entireties, thus there was no inheritance. Further, at the time of his death Al Tarsi had four children and twelve grandchildren, none of whom received anything from the estate.

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[8] This discussion occurred on the third day of trial, October 26, 1990, and appears at p. 407 of the notes of trial testimony.

The substance of Ms. Tarsi's testimony went to a collateral matter introduced at trial, i.e., appellant's belief that his parents had stolen his inheritance from Uncle Al. The fact that Ms. Tarsi testified after being in the courtroom and hearing the testimony of Joan Pierce on this issue was thoroughly explored on cross-examination. Thus, the jury was able to weigh what effect if any, Ms. Tarsi's presence in the courtroom had upon her trial testimony. Further, the testimony itself disputed the Commonwealth's position that appellant's motive for the murder was to get back at his parents for stealing his inheritance. Under the circumstances trial counsel cannot be ineffective. Counsel objected to the witness being permitted to testify, and when the objection was overruled she effectively examined the witness. This issue is without merit.

Having disposed of appellants' claims as to the ineffectiveness of trial counsel, we now turn to his allegations of prosecutorial misconduct. A new trial will be granted where the conduct of the prosecution misleads the jury so that they form in their minds a fixed bias such that they cannot fairly weigh the evidence and render a true verdict. Commonwealth v. Johnson, 516 Pa. 527, 533 A.2d 994 (1987); Commonwealth v. Bricker, 506 Pa. 571, 487 A.2d 346 (1985); Commonwealth v. Collins, 462 Pa. 495, 341 A.2d 492 (1975). The assertions of prosecutorial misconduct concern the prosecutor's calling of George Pierce, Jr. and Helen Tarsi to the stand, after both witnesses had been present in the courtroom in violation of the sequestration order. Trial counsel objected, as discussed above, and the objection was overruled. We note that the prosecutor admitted allowing George Pierce, Jr. to remain in the courtroom, but claimed to be unaware of the identity of Ms. Tarsi prior to the objection of trial counsel regarding the violations of the sequestration order.

In making this argument appellant focuses upon the conduct of the prosecutor in allowing the witnesses to remain in the courtroom. Appellant asserts that the witnesses were then able to conform their testimony consistent with that of the prosecution witnesses they had observed, and therefore circumvented the very purpose of the sequestration order. First, we acknowledge that the sequestration order was in fact violated by the prosecutor. It is irrelevant whether or not she was actually aware of the identity of Helen Tarsi; the prosecution is obliged to ensure that all of the witnesses she intends to call comply with the orders of the trial court. However, the fact that a violation of the sequestration order occurred does not, in and of itself, lead to a finding that the prosecutor committed misconduct of such a nature that a new trial is required. To prevail on this issue appellant must show that the prosecutor's conduct here was a deliberate attempt to mislead the jury. Collins, supra. In order to properly resolve this issue we must look at the substance of the testimony offered by George Pierce, Jr. and Helen Tarsi.

George Pierce, Jr. was the son and grandson of the decedents and the brother of the appellant. He testified that he had identified the bodies of each of the decedents. The prosecutor was prohibited from asking any questions regarding his knowledge of the relationship between the appellant and the decedents. Helen Tarsi's testimony, as related above, dealt exclusively with the fact that her husband, appellant's Uncle Al, died intestate, thus no inheritance was devised to appellant. Neither the testimony of George Pierce, Jr. nor that of Helen Tarsi could have been altered by their presence in the courtroom prior to taking the stand. Each witness testified to personal observations outside the scope of knowledge of any other witnesses.

The essence of a finding of prosecutorial misconduct is that the prosecutor, a person who holds a unique position

of trust in our society, has abused that trust in order to prejudice and deliberately mislead the jury. See Commonwealth v. Toth, 455 Pa. 154, 314 A.2d 275 (1974); Commonwealth v. Revty, 448 Pa. 512, 295 A.2d 300 (1972); and Commonwealth v. Potter, 445 Pa. 284, 285 A.2d 492 (1971). Based upon the actual testimony of the witnesses who were in the courtroom in violation of the sequestration order, we do not find that this prosecutor intentionally and deliberately caused the violation in an effort to mislead the jury and purposely create undue prejudice to the appellant.[9]

Next, appellant asserts that the trial court erred in denying his request for a view. Appellant specifically wished to have the jury physically view the area where Harry Espenshade, Randy Zehnder and Sergeant Shanfield testified that they had observed the appellant on the night of the fire. The view was requested in order to illustrate that the lighting conditions were such that the identification testimony of these witnesses was suspect. The trial court denied the view. Absent an abuse of discretion the decision of the trial court will not be overturned. Commonwealth v. Mangini, 478 Pa. 147, 386 A.2d 482 (1978).

The evidence presented included a significant number of photographs and a map of the area in question. The trial court found that the jury was able to discern the physical layout and that they were adequately apprised of the lighting conditions on the night of the fire. In addition, since the fire itself altered the light available on the night the

[9] We note that the remedy for a violation of a sequestration order is a matter left to the discretion of the trial court. Commonwealth v. Smith, 464 Pa. 314, 346 A.2d 757 (1975). Further, based upon our review of the testimony of George Pierce, Jr. and Helen Tarsi, we do not find any error by the trial court in permitting their testimony.

identifications were made, and those exact conditions could never be adequately duplicated, the court chose to deny the request for a view. Given the trial court's explanation we cannot find that an abuse of discretion occurred.

In his final issue raised in the guilt stage, appellant asserts that the verdict was against the weight of the evidence. Here the appellant attacks the credibility of various witnesses and the inconclusiveness of certain physical evidence. As this Court has repeatedly stated:

> On appellate review of a criminal conviction, we will not weigh the evidence and thereby substitute our judgment for that of the finder of fact. Commonwealth v. Woodhouse, 401 Pa. 242, 261, 164 A.2d 98 (1960). To do so would require an assessment of the credibility of the testimony and that is clearly not our function. Commonwealth v. Sullivan, 436 Pa. 450, 456, 263 A.2d 734 (1970), cert. denied, 400 U.S. 882, 91 S. Ct. 127, 27 L.Ed.2d 120 (1971); Commonwealth v. Schuck, 401 Pa. 222, 228, 164 A.2d 13 (1960), cert. denied, 368 U.S. 884, 82 S.Ct. 138, 7 L.Ed.2d 188 (1961).

Commonwealth v. Farquharson, 467 Pa. 50, 59-60, 354 A.2d 545, 550 (1976). Accordingly, we decline the appellant's invitation to substitute our judgment as to the weight of the evidence for that of the jury and the trial court.

We now turn to appellant's final argument, which concerns the penalty stage of the proceeding. Upon deliberation following the penalty stage proceedings, the jury unanimously found two aggravating circumstances: 42 Pa.C.S. § 9711 (d)(6) (The defendant committed a killing while in the

perpetration of a felony) and (d)(7) (In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense) and one or more of the jurors found one mitigating circumstance, 42 Pa.C.S. § 9711 (e)(1) (The defendant has no significant history of prior criminal offenses). The jury unanimously found that the aggravating circumstances outweighed the mitigating circumstance and thus, concluded that a sentence of death at each count of murder in the first degree should be imposed.

Appellant asserts that it was error to permit the jury to consider both aggravating circumstance (d)(6) and (d)(7). Appellant does not dispute the applicability of aggravating circumstance (d)(7) to this case. Rather, appellant focuses upon the aggravating circumstance (d)(6) (Killing committed in perpetration of a felony). The appellant argues that when a murder is committed by arson the arson is an element of the crime of murder and should not be considered as a separate criminal act. Appellant asserts that if he had shot or stabbed the victims in this case he would not be facing an additional aggravating circumstance simply because of the method by which he chose to commit the homicide. Appellant's argument is absurd. The sentencing scheme at issue specifically sets forth aggravating circumstances which are designed to take into account the method by which the accused has committed the offense. See generally, 42 Pa.C.S. § 9711(d). Aggravating circumstance (d)(6) applies in this case precisely because this appellant chose to commit murder in the first degree by means of arson, a felony. Accordingly, appellant's argument that aggravating circumstance (d)(6) should not have been considered in this case is without merit.

Finally, in accordance with our statutory duty, 42 Pa.C.S. § 9711(h)(3), we must affirm the sentence of death unless we determine that:

> (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;
>
> (ii) the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d); or
>
> (iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

Upon our review of the record we conclude that the sentence imposed was not the product of passion, prejudice or any other arbitrary factor. We further find that the evidence was sufficient to establish the two aggravating factors found by the jury. Specifically, that the murder occurred in the course of a felony (arson), and that the appellant, in the course of committing the murder, caused a grave risk of death to another person in addition to the decedents (in setting the fire the appellant exposed his sister, Joan Pierce, to a grave risk of death). 42 Pa.C.S. § 9711 (d)(6) and (d)(7).

In addition, after reviewing the information compiled by our Administrative Office in accordance with the requirements set forth in Commonwealth v. Frey, 504 Pa. 428, 475 A.2d 700 (1984), cert. denied 469 U.S. 963 (1984), we do not find the sentence imposed upon the appellant to be disproportionate to the sentence imposed upon defendants in

similar cases. Accordingly, the judgment of sentence of death must be affirmed.[10]

MR. JUSTICE LARSEN DID NOT PARTICIPATE IN THE DECISION OF THIS MATTER.

SENIOR JUSTICE MONTEMURO WAS AN APPOINTED JUSTICE OF THE COURT AT THE TIME OF ARGUMENT. *

*MR. JUSTICE MONTEMURO IS SITTING BY DESIGNATION AS SENIOR JUSTICE PURSUANT TO JUDICIAL ASSIGNMENT DOCKET NO. 94 R1801, DUE TO THE UNAVAILABILITY OF MR. JUSTICE LARSEN, SEE NO. 127 JUDICIAL ADMINISTRATION DOCKET NO. 1, FILED OCTOBER 28, 1993.

Judgment entered
Dated: July 1, 1994

/s/
Charles W. Johns, Esquire
Prothonotary

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[10] The Prothonotary of the Supreme Court is directed to transmit, as soon as possible, the full and complete record of the trial, sentencing hearing, imposition of sentence and review by the Court to the Governor. 42 Pa.C.S. § 9711 (i).

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	AUGUST TERM, 1989 NO. 1312-1321
v.	:	SEPTEMBER TERM, 1990
MICHAEL PIERCE	:	NO. 0323-0327

OPINION

SAVITT, J. May 14, 1992

FACTS AND HISTORY

In the early morning hours of Monday, July 10, 1989 at about 3:30 a.m. the defendant's sister, Joan Pierce, awoke in her second floor bedroom to the smell of gasoline in the house at 3011 Byberry Road where she lived with her parents and her grandmother. When Joan Pierce got up to investigate and looked down the stairs she saw flickering on the wall and called to her father. Both went downstairs to discover that the livingroom couch was on fire and when the elder Pierce opened the door to the basement, flames and smoke shot out the door. At that point both father and daughter fled the house to safety, but shortly thereafter Mr. Pierce ran back into the house in an attempt to rescue his wife and her mother who were in upstairs bedrooms. Later he was dragged out of the house badly burned and restrained from going back. Neither Mrs. Pierce nor her mother Anna Hayes was able to escape and both perished in the fire. Mr. Pierce was taken to St. Agnes hospital and then to St. John

Newman's Nursing Home where he died from his burns on January 29, 1990.

The evidence showed that the defendant, Michael Pierce, had been put out the house by his parents about ten days before the fire and that at the time of the fire he was staying at the home of a friend across the street from 3011 Byberry Road. The evidence also showed that the fire was of incendiary origin, that the defendant had threatened to kill his parents prior to the fire, saying specifically on several occasions that he was going to set the house on fire and that he was seen running from the scene of the fire.

This case was tried by this court and a jury from October 16, 1990 to November 1, 1990 and the defendant found guilty of three counts of Murder in the First Degree, Arson, Aggravated Assault, Recklessly Endangering Another Person, and Risking Catastrophe. On November 1, 1990, following a penalty stage hearing, the jury sentenced the defendant to death on each of the three first degree murder convictions.

Post sentence motions were timely filed by trial counsel, Janis Smarro, Esquire who then withdrew and supplemental motions were filed by present counsel Earl G. Kauffman, Esquire. Hearings on the ineffectiveness claims raised by defendant were held on July 10, 1991, October 22, 1991 and December 11, 1991. Final argument was heard and the post sentence motions denied on April 3, 1992. This appeal followed.

OPINION

There are sixty averments of error in the instant case filed by trial counsel, present counsel and by the defendant

pro se, all of which have been considered by this court and fourteen of which will be addressed in the opinion which follows. Defendant first argues that this court erred in denying his request for a jury view of the scene of the crime, in its instructions to the jury at the death penalty phase and in permitting evidence of two aggravating circumstances to be presented at the penalty stage. The defendant next alleges there was misconduct by the prosecution in permitting two Commonwealth witnesses to remain in the courtroom in the face of a sequestration order and in referring to the defendant as a "bad seed" in closing argument. Defendant also argues that he was prejudiced by the comment made by a juror after the Commonwealth's arson expert testified. Defendant further argues that trial counsel was ineffective at the trial stage for not asking for a mistrial when the prosecutor failed to sequester two witnesses and when a police officer blurted out an accusation against defendant made by defendant's sister and for not calling a defense arson expert. Defendant further argues trial counsel was ineffective at the penalty stage of the trial for failing to introduce his employment and military service records, for not presenting psychiatric testimony and for not presenting certain character witnesses to testify on his behalf. Finally, defendant argues that the evidence was insufficient to sustain the verdict, and that the verdict was contrary to the weight of the evidence and contrary to law.

Defendant's argument that the court erred in refusing his request for a jury view of the area in which the eyewitnesses testified to seeing the defendant has no merit. Whether to grant a request for a view is a matter within the sound discretion of the trial judge and his decision to grant or deny such a view will not be overturned absent an abuse of discretion. Commonwealth v. Mangini, 478 Pa. 147, 386 A.2d 482(1978), Commonwealth v. Thomas, 346 Pa. Super. 11, 498 A.2d 1345(1985), allocatur denied, 514 Pa. 635, 522

A.2d 1105 (1987). In the case at bar the location was extensively described by oral testimony, photographs and a sketch by the Commonwealth. In addition, defense counsel presented her own investigator, Clark Fuss, who testified to his measurements of the area and presented photographs. Defense counsel was able to argue in her closing, based on Mr. Fuss' testimony, that certain witnesses could not have seen the defendant running away as they claimed in their testimony. Under these circumstances a jury view of the area was not necessary, the court did not abuse its discretion in refusing a jury view and the defendant is not entitled to a new trial on this basis.

Defendant argues that the court erred in not instructing the jury during the penalty phase of the trial that they had the discretion to sentence the defendant to life imprisonment even if they found at least one aggravating circumstance and no mitigating circumstances or that the aggravating circumstances outweigh the mitigating circumstances. This argument has no merit. Under the provisions of 42 Pa. C.S.A. §9711(c), Instruction of the Jury, it is provided, inter alia, that the court shall instruct the jury regarding the aggravating circumstances and that "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases." Thus, the instruction given by this court is the instruction mandated by 42 Pa. C.S.A. §9711(c) and no instruction as to discretion was required.

The court did not err in permitting the Commonwealth to present two aggravating circumstances - 42 Pa. C.S.A. §9711(d)(6), "the defendant committed a killing while in the perpetration of a felony" and 42 Pa. C.S.A.

§9711(d)(7), "in the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense." Defendant's argument that in the case of arson these aggravating circumstances are in effect the same circumstance has no merit. Aggravating circumstance (d)(6) arises because the defendant killed his mother, father and grandmother in the course of committing the felony of Arson. Aggravating circumstance (d)(7) arises because the defendant placed his sister, who was also asleep in the house at the time of the fire, at grave risk of death. Thus, although both aggravating circumstances arose out of the same event, the elements of each circumstance are different and the elements of one are not included in the other. These are two distinct aggravating circumstances and the Commonwealth was entitled to present them both at the sentencing hearing.

With regard to the issue of alleged prosecutional misconduct in permitting witnesses George Pierce and Helen Tarsi to remain in the courtroom during testimony in violation of the sequestration order, it is settled law that improper actions by the Commonwealth do not constitute grounds for relief unless it results in prejudice to the defendant. Commonwealth v. Davis, 452 Pa. 171, 305 A.2d 715(1973); Commonwealth v. Lieb, 403 Pa. Super. 223, 588 A.2d 922 (1991). In the case at bar George Pierce, the son of the deceased, was permitted to remain in the courtroom throughout the trial and testified only as to the identification of the victims' bodies and not as a fact witness. Helen Tarsi, the defendant's aunt and sister of his father testified that her husband, the defendant's uncle died without a will and did not leave any money to the defendant. This witnesses' testimony concerned a matter which was only collateral at most and not testified to by any other witness. Under these circumstances there was no violation of the sequestration order and no prejudice to the defendant.

With regard to the prosecutor 's remark that the defendant was "a real bad seed", a prosecutor's arguments to the jury are not the basis for a new trial unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed hostility toward the defendant which prevented them from properly weighing the evidence and rendering a true verdict. Commonwealth v. Gorby, ___ Pa. ___, 588 A.2d 902 (1991); Commonwealth v. Smith, 518 Pa. 15, 540 A.2d 246 (1988). Here, the prosecutor's passing reference to the defendant being a bad seed cannot be deemed prejudicial. Further, it was a conclusion properly drawn from the evidence of the defendant's long-term hostility to his parents and his repeated threats to harm or kill them.

Defendant's averment that he was prejudiced by juror Kathleen McBride's comment, "it was arson" which was allegedly made after the Commonwealth's arson expert testified has no merit. At the December 11, 1991 hearing Ms. McBride testified that she had made no such comment.

Counsel is presumed to be effective and the defendant has the burden of proving ineffectiveness. Commonwealth v. Williams, 542 Pa. 218, 590 A.2d 75 (1990); Commonwealth v. McNeil, 506 Pa. 607, 487 A.2d 802 (1985); Commonwealth v. Stinnet, 356 Pa. Super. 83, 514 A.2d 154 (1986). In order to carry this burden the defendant must first show that the claim which counsel failed to raise has arguable merit and that counsel's failure to raise it was without a reasonable basis which would effectuate the defendant's best interests. Strickland v. Washington, 466 U.S. 688 (1984); Commonwealth v. Basemore, 525 Pa. 512, 582 A.2d 861 (1990); Commonwealth v. Buel, 510 Pa. 363, 508 A.2d 1167 (1986); Commonwealth ex rel Washington v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967) . Second, the defendant

must show that counsel's ineffectiveness worked to his prejudice. Strickland v. Washington, supra; Commonwealth v. Pierce, 515 Pa. 153, 527 A. 2d 973 (1987), Commonwealth v. Buel, supra; Commonwealth v. Garvin, 335 Pa. Super. 560, 485 A.2d 36 (1984). In order to show prejudice the defendant must demonstrate that there is a reasonable possibility that but for counsel's unprofessional errors, the result of the trial would have been different. Strickland v. Washington, supra, Commonwealth v. Pierce, supra.

To establish that counsel was ineffective for not calling certain witnesses, the defendant must show not only that counsel was aware of their existence and had no reasonable basis for failing to call them, but also that their testimony could have been beneficial under the fact's and circumstances of the defendant's case. Commonwealth v. Jasper, 526 Pa. 497, 587 A.2d 705 (1991), Commonwealth v. McNeil, supra, Commonwealth v. Leonard, 499 Pa. 357, 453 A.2d 587 (1982). Most important, the defendant must also show that he was prejudiced by counsel's failure to call these witnesses, i.e., that it is reasonably likely that the decision reached by the jury would have been different had they been called to testify. Strickland v. Washington, supra; Commonwealth v. Jasper, supra; Commonwealth v. Pierce, supra.

Trial strategy is within the exclusive province of counsel. Commonwealth v. Roundtree, 469 Pa. 241, 364 A.2d 1359 (1976); Commonwealth v. Metzger, 295 Pa. Super. 267, 441 A.2d 1225 (1981) . Counsel will not be declared ineffective where his trial strategy has a reasonable basis designed to effectuate his client's interest. Commonwealth v. Buehl, supra. Commonwealth ex rel. Washington v. Maroney, supra; Commonwealth v. Metzger, supra. The defendant must show that the alternative not chosen offered a better potential for success than the strategy and tactics actually used. Commonwealth v. Hubbard, 472 Pa. 259, 372

A.2d 687 (1987), Commonwealth v. Metzger, supra. Although hindsight might reveal the comparative worth of alternatives not pursued, an ineffectiveness claim cannot succeed on that basis. Commonwealth v. Chester, 526 Pa. 578, 587 A.2d 1367, cert. denied, Laird v. Pennsylvania, 112 S.Ct. 152 (1992).

Defendant's averment that trial counsel was ineffective for failing to call an arson expert has no merit. First, trial counsel testified at the July 10, 1991 ineffectiveness hearing that she did not call an arson expert because the defense theory of the case was that the defendant had nothing to do with setting the fire rather than that the fire was not incendiary in origin. Trial counsel clearly had a reasonable basis for not calling an arson expert. Furthermore, the arson expert called at the December 11, 1991 ineffectiveness hearing testified that he also believed that the fire was deliberately set and that an accelerant was used in setting the fire in the basement of the residence. Such testimony would have been of no benefit to the defendant and he is not entitled to a new trial on this basis.

Defendant also argues that trial counsel was ineffective for not calling an arson expert who could testify that the fire was started in the couch located on the first floor to serve as a warning to the victims, a warning which would indicate that he did not intend to kill his victims. This argument is without merit. First, no arson expert would be permitted to testify that the defendant set the first fire as a warning because such a conclusion would be outside his expertise and not admissible. Second, trial counsel cannot be held responsible for every alternative revealed by hindsight but not pursued. There is absolutely no showing on this record that the defendant ever told counsel that the fire in the couch was started as a warning or that he did not mean to kill the victims. Rather he continued to maintain throughout the trial

that he was in no way responsible for the fire. Furthermore, given the evidence of the defendant's hate for the victims and his threats to kill his parents, there is no reasonable likelihood that the outcome of the trial would have been different had a defense arson expert been called to testify that the fire in the couch could have been a warning.

Defendant's allegation that trial counsel was ineffective for failing to ask for a mistrial when two Commonwealth witnesses who had not been sequestered were called to testify has no arguable merit. As has already been noted, under these circumstances there was no violation of the sequestration order and no reason for trial counsel to ask for a mistrial.

There is no merit to defendant's allegation that trial counsel was ineffective for failing to ask for a mistrial after Commonwealth witness Officer William White blurted out that Joan Pierce said "he did it, he did it" at the scene of the fire. The words "he did it" did not necessarily refer to the defendant and the court immediately instructed the jury that this testimony was not admissible and that they should not consider it. There was no need to ask for a mistrial and trial counsel was not ineffective for failing to do so.

With respect to the penalty stage of the trial, defendant first claims that counsel was ineffective for failing to introduce his military service and employment records as mitigating circumstances.

With regard to the employment records, trial counsel testified at the July 10, 1991 hearing that although defendant did sign a release for his employment records, she was not able to obtain them prior to trial and decided to proceed without them. These employment records with the United States Postal Service were presented as evidence at the ineffectiveness hearing on October 22, 1991. A review of these

records shows that during his tenure with the U.S. Postal Service from May 1981 to May 1987, the defendant was suspended or issued letters of warning on numerous occasions, most often for failure to meet attendance requirements, once for disrespect and threatening a postal supervisor and once for conduct unbecoming a postal employee and disrespect to a postal customer and that his final discharge resulted from an incident in which he threatened a postal customer on his mail route. Thus, defendant's claim that trial counsel should have presented his Postal Service employment record has no arguable merit because these records were not favorable to the defendant.

At the July 10, 1991 hearing trial counsel testified that she neither obtained the defendant's service records nor attempted to use them at the penalty stage of the trial because defendant refused to sign a release for the records and told counsel that he did not want her to present anything on his behalf at the penalty hearing. The record here shows that there was testimony about the defendant's service in the Navy during trial and trial counsel in her closing argument argued vigorously that the jury could find a "catch-all" mitigating circumstance based on anything including the defendant's character and background. Thus, the jury was not precluded from finding the defendant's service with the Navy as a mitigating circumstance. Furthermore, while defendant's service records show an honorable discharge they also show that the defendant was fined for being AWOL on two occasions during his three year tenure in the Navy. There has been no showing that the outcome of the penalty stage would have been different had defendant's service record been presented and he is not entitled to a new trial on this basis.

With respect to the issue of psychiatric testimony, trial counsel testified at the July 10, 1991 that defendant had told her "in no uncertain terms" that he would not speak to

either a psychologist or a psychiatrist. In light of this, obtaining a psychiatric witness would have been a futile gesture. Furthermore, trial counsel did argue that the defendant was under the influence of extreme mental or emotional distress at the time he committed the act based on the testimony of Joan Pierce and Timothy O'Reilly and also that the defendant's capacity to conform his conduct to the requirements of law was substantially impaired also based on testimony at trial. Counsel was not ineffective for not introducing psychiatric testimony and defendant is not entitled to a new trial on this basis.

There is no merit to defendant's claim that trial counsel was ineffective for failing to call certain witnesses. At the July 10, 1991 hearing trial counsel testified that defendant gave her names of two or three possible witnesses and that her investigator looked for them, but was unable to find them. Furthermore, there has been no showing that these witnesses would have been beneficial to defendant had they been located. Trial counsel was not ineffective and defendant is not entitled to a new trial on this basis.

Finally, defendant argues that the evidence was insufficient to support the verdict, the verdict was against the evidence and the verdict was contrary to law.

The test for sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the jury could reasonably have determined all elements of the crime to have been established beyond a reasonable doubt. Commonwealth v. Porter, 524 Pa. 162, 569 A.2d 942 (1990); Commonwealth v. Hardcastle, 519 Pa. 236, 546 A.2d 1101 (1988), cert. denied, 110 S.Ct. 1169 (1989).

Viewing the evidence in the case at bar in the light most favorable to the Commonwealth, it is clear that it was sufficient to sustain the defendant's conviction for three counts of First Degree Murder, Arson, Aggravated Assault, Recklessly Endangering Another Person and Risking Catastrophe. There is no merit to defendant 's claim that the evidence against him was not sufficient.

A defendant may be given a new trial on the ground that the verdict is against the weight of the evidence even where the evidence is legally sufficient to sustain a guilty verdict. Commonwealth v. Vogel, 510 Pa. 314, 461 A.2d 604 (1983), cert. denied, 465 U.S. 1104 (1984); Commonwealth v. Bowermaster, 297 Pa. Super. 444, 444 A.2d 115 (1982). The decision to grant or deny a motion on this ground is committed to the sound discretion of the trial court. Commonwealth v. Whitney, 511 Pa. 232, 512 A.2d 1152 (1986), Commonwealth v. Pronkoskie, 498 Pa. 245, 445 A.2d 1203 (1982); Commonwealth v. Hunter, 381 Pa. Super. 606, 554 A.2d 550 (1989). A new trial should be awarded on the ground that the verdict is so contrary to the evidence as to shock one's sense of justice and to make the award of a new trial imperative. Commonwealth v. Laing, supra.

The record in the instant case discloses that the conviction is sustained by the weight of the evidence. Therefore, the defendant's request for a new trial on this ground is without merit.

In the instant case, the verdict was clearly an alternative left to the court after the presentation of the evidence. Accordingly, the verdict was not contrary to law, see Commonwealth v. Ashford, 227 Pa. Super. 351, 322 A.2d 722 (1974), and the defendant is not entitled to a new trial on this account.

For the reasons set forth herein the defendant's Motions for a New Trial and in Arrest of Judgment were **denied**.

/s/ Savitt
J.

COURT OF COMMON PLEAS
ADULT PROBATION AND PAROLE DEPARTMENT
121 NORTH BROAD STREET
PHILADELPHIA, PENNSYLVANIA 19107

EDWARD J. BRADLEY
President Judge

JAMES A. BUGGY
Court Administrator
Trial Division

EDWARD J. BLAKE
Administrative Judge
Trial Division

MENTAL HEALTH EVALUATION

DEFENDANT'S NAME: PIERCE, MICHAEL

DEFENDANT'S AGE: 33

DATE EXAMINED: 11-20-89

IDENTIFYING INFORMATION:

This pre trial mental health evaluation is the first mental health evaluation for this thirty-three year old Caucasian, Catholic male who gives his date of birth as 8-1-56. The Subject interviewed at the request of the Honorable Charles Durham requested 11-14-89 and performed on 11-20-89, pursuant to charges of Murder, Arson, Voluntary Manslaughter, Involuntary Manslaughter, Aggravated Assault and Simple Assault. The purpose of the evaluation is to determine competency to stand trial.

The Subject was informed of the nature of this evaluation and agreed to cooperate.

SOURCES OF INFORMATION:

Include a computer extract of the Subject's offenses.

BACKGROUND HISTORY:

The Subject reports that his mother and father were together until his mothers death this year. The Subject lived with his parents until 1984 and has been on his own since then. At times he has lived in California over the past five years. The Subject reports that he has three sisters and two brothers. He is the fifth sibling.

The Subject was married from March to December, 1987. The marriage ended when he found that she was cheating on him. He denies having any children.

The Subject graduated from Archbishop Ryan High School. He also took courses at Montgomery County Community College. The Subject's longest job was working for the Post Office for six years.

The Subject was in the Navy from August, 1977 to August, 1980. He received an Honorable Discharge.

PHYSICAL AND MENTAL HEALTH HISTORY:

The Subject reports that he was beaten by guards while he was in prison. He reports that he sustained stitches and pins in the first two fingers in his left hand. He reports some residual numbness in his right arm and has stitches in his face and his head. He also reports that he lost caps in his teeth. At times he experiences "dizzy spells" in which he feels as though he is going to faint. He reports that while he was beaten he had seizures. He denies taking any anti-seizure medication. He also reports taking pain killers. He

reports that he plans to see a neurosurgeon for these seizures and for evaluation of his wounds to his arms and head.

MENTAL STATUS EXAM:

This was a well developed, well nourished young White male with a beard who displayed good eye contact. His thoughts were goal oriented and there were no evidence of a psychotic process. The Subject was oriented to person, place and time. The content of his thoughts were appropriate for the interview. He denied suicidal or homicidal ideation, auditory or visual hallucinations, or persecutory ideas. His memory for long and short term events was good. His judgment was good. His ability to abstract was good and his performance on proverbs was good.

PSYCHIATRIC ASSESSMENT:

The subject is capable of standing trial.

He does not suffer from a major mental illness that would interfere with his ability to stand trial. The Subject understands the nature of the procedures in which he is engaged and can cooperate with his attorney to prepare a rational defense.

/s/_____
Eric Becker, M.D.

EB:sl

COURT OF COMMON PLEAS
ADULT PROBATION AND PAROLE DEPARTMENT
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PHILADELPHIA, PENNSYLVANIA 19107

EDWARD J. BRADLEY
President Judge

JAMES A. BUGGY
Court Administrator
Trial Division

EDWARD J. BLAKE
Administrative Judge
Trial Division

MENTAL HEALTH EVALUATION

DEFENDANT'S NAME: PIERCE, MICHAEL

DEFENDANT'S AGE: 33

DATE EXAMINED: 3/9/90

IDENTIFYING INFORMATION:

This is a 32 year old, White, Catholic, male who was born on 8/1/56.

This evaluation is made at the request of Judge Durham to assess if the Defendant is competent to stand trial.

CONSENT:

The Defendant was informed of the nature of this evaluation and he declined to cooperate.

The interaction was polite and appropriate and there was no mental illness throughout this brief interview.

/s/_____
PIETRO MIAZZO, M.D.

PM:hd
3/12/90

COURT OF COMMON PLEAS
ADULT PROBATION AND PAROLE DEPARTMENT
121 NORTH BROAD STREET
PHILADELPHIA, PENNSYLVANIA 19107

EDWARD J. BRADLEY
President Judge

JAMES A. BUGGY
Court Administrator
Trial Division

EDWARD J. BLAKE
Administrative Judge
Trial Division

MENTAL HEALTH EVALUATION

DEFENDANT'S NAME: PIERCE, MICHAEL

DEFENDANT'S AGE: 33

DATE EXAMINED: 3-15-90

IDENTIFYING INFORMATION:

This Defendant is a thirty-three years old White, Catholic male who was born on 8-1-56.

This evaluation is made at the request of Judge Kirkland to assess if the Defendant is competent to stand trial.

The Defendant was made aware of the nature of this evaluation and he declined to cooperate with this examiner.

The Defendant was appropriate throughout this interview and he was appropriately dressed and behaved. The interaction was police and coherent.

/s/
Pietro Miazzo, M.D.

PM:sl

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
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TELEPHONE
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November 16, 2004

Mr. Michael Pierce
Greene SCI
175 Progress Drive
Waynesburg, PA 15370

Re: Pierce v. Blaine
C.A. No. 04-9000
D.C. No. 02-cv-00513

Dear Mr. Pierce:

The enclosed correspondence is being returned to you as it is illegible. If you wish to have documents considered by the Court, we suggest that you print the text in a clear and legible fashion.

It should be noted, however, that this Court does not permit "hybrid" or dual representation. Only submissions made by counsel will be accepted for filing. Counsel is

solely responsible for the prosecution of the appeal including decisions as to what issues will be presented to the Court. A copy of your correspondence is being provided to Michael Wiseman, Esq.

Very truly yours,

/s/
NICOLE M. BRUNO
Legal Assistant

cc: Michael Wiseman, Esq. (with enclosure)
Thomas W. Dolgenos, Esq.

DOCKET ENTRIES

MICHAEL PIERCE V. CONNOR BLAINE, ET AL.
CIVIL ACTION NO. 2:02cv513
(United States District Court
for the Eastern District of Pennsylvania)

Date	#	Docket Text
01/31/2002	1	Relator's petition for writ of habeas corpus together with statement in support of request to proceed in forma pauperis. (gm) (Entered: 01/31/2002)
01/31/2002	--	Habeas Corpus Case Management Track. (gm) (Entered: 01/31/2002)
01/31/2002	--	OMNIBUS MOTION BY PETITIONER MICHAEL PIERCE TO BE ABLE TO FILE AN ALL INCLUSIVE HABEAS CORPUS LISTING EACH ISSUE INDIVIDUALLY IN DETAIL AND ANY ADDITIONAL ISSUES; APPOINTMENT OF COUNSEL TO EITHER ASSIST OR REPRESENT PETITIONER AND COURT ORDER HAVING FILING CONTRACT WHILE PETITIONER TIMELY FILES APPEALS TO OPTIONS AVAILABLE , BRIEF, VERIFICATION, PROOF OF SERVICE. (gm) (Entered: 01/31/2002)

01/31/2002	2	Copy of certificate of death penalty (original to USCA). (gm) (Entered: 01/31/2002)
02/01/2002	3	ORDER REASSIGNING FROM THE CALENDAR OF JUDGE MARVIN KATZ TO THE CALENDAR OF JUDGE BERLE M. SCHILLER. (SIGNED BY CLERK OF COURT MICHAEL E. KUNZ) 2/1/02 ENTERED AND COPIES MAILED. (gm) (Entered: 02/01/2002)
02/04/2002	4	ORDER REASSIGNING FROM THE CALENDAR OF JUDGE BERLE M. SCHILLER TO THE CALENDAR OF JUDGE RONALD L. BUCK-WALTER . (SIGNED BY CLERK OF COURT MICHAEL E. KUNZ) 2/5/02 ENTERED AND COPIES MAILED. (gm) (Entered: 02/05/2002)
02/19/2002	5	ORDER THAT THE DEFENDER ASSOCIATION OF PHILADEL-PHIA, FEDERAL COURT DIVI-SION, IS HEREBY APPOINTED PURSUANT TO TITLE 18, SEC. 3006 A TO REPRESENT SAID DEFENDANT IN THE ABOVE MATTER, SAID APPOINTMENT SHALL REMAIN IN EFFECT UNTIL TERMINATED OR A SUBSTITUTE ATTOREY IS APPOINTED; ETC. (SIGNED BY JUDGE RONALD L. BUCKWAL-TER) 2/20/02 ENTERED AND

		COPIES MAILED. (jl) (Entered: 02/20/2002)
03/21/2002	6	MOTION BY PETITIONER MICHAEL PIERCE FOR REMOVAL OF COURT APPOINTED COUNSEL AND APPOINTMENT OF NEW COUNSEL OR TO BE ALLOWED TO PROCEED PRO SE WITH APPOINTED STANDY COUNSEL , PROOF OF SERVICE. (gm) (Entered: 03/22/2002)
04/05/2002	7	MOTION BY PETITIONER MICHAEL PIERCE FOR A STAY OF EXECUTION , CERTIFICATE OF SERVICE. (gm) (Entered: 04/08/2002)
04/25/2002	8	ORDER THAT PETITIONER'S PENDING MOTIONS: (1) OMNI-BUS MOTION TO BE ABLE TO FILE AN ALL INCLUSIVE HABEAS CORPUS LISTING EACH ISSUE INDIVIDUALLY, ETC., FILED ON JANUARY 31, 2002 (#0-1) AND (2) MOTION FOR REMOVAL OF COURT APPOINTED COUNSEL FILED ON MARCH 21, 2002 (#6) ARE DENIED. HOWEVER, A COUN-SELED HABEAS CORPUS PETI-TION MAY BE FILED IN THIS MATTER ON OR BEFORE JUNE 25, 2002. IT IS SO ORDERED. (SIGNED BY JUDGE RONALD L.

		BUCKWALTER) 4/26/02 ENTERED AND COPIES MAILED. (gm) (Entered: 04/26/2002)
04/25/2002	9	ORDER THAT UPON CONSIDERATION OF PETITIONER'S MOTION FOR A STAY OF EXECUTION, FILED APRIL 5, 2002 (#7), TO WHICH NO RESPONSE HAS BEEN FILED IT IS HEREBY ORDERED THAT IN VIEW OF THE GOVERNOR'S DEATH WARRANT-SIGNING POLICY, AND THE IMMINENCE OF THE ISSUANCE OF A WARRANT, A STAY OF EXECUTION IS GRANTED SO THAT THE ISSUANCE OF A DEATH WARRANT WILL NOT INTERFERE COUNSEL'S ABILITY TO PREPARE A MEANINGFULLY COUNSELED HABEAS CORPUS PETITION AND WITH THE ADJUDICATION OF THESE HABEAS PROCEEDINGS. (SIGNED BY JUDGE RONALD L. BUCKWALTER) 4/26/02 ENTERED AND COPIES MAILED. (gm) (Entered: 04/26/2002)
05/02/2002	10	MOTION by PETITIONER MICHAEL PIERCE FOR REMOVAL OF COURT APPOINTED COUNSEL , CERTIFICATE OF COUNSEL, CERTIFICATE OF SERVICE. (gn) (Entered: 05/03/2002)

06/19/2002	11	UNOPPOSED MOTION BY PETITIONER MICHAEL PIERCE TO EXTEND TIME TO FILE FIRST-COUNSELED PETITION FOR WRIT OF HABEAS CORPUS, CERTIFICATE OF SERVICE. (gm) (Entered: 06/20/2002)
06/24/2002	12	ORDER THAT IN LIGHT OF THIS COURT'S ORDER OF THIS DAY GRANTING PETITIONER'S UNOPPOSED MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE HIS FIRST COUNSELED PET FOR WRIT OF HABEAS CORPUS (#11) IT IS HEREBY ORDERED THAT THE PETITION OF MICHAEL PIERCE TO REMOVE COURT-APPOINTED COUNSEL (#10) IS DENIED. (SIGNED BY JUDGE RONALD L. BUCKWALTER) 6/25/02 ENTERED AND COPIES MAILED. (gm) Modified on 06/25/2002 (Entered: 06/25/2002)
06/24/2002	13	ORDER THAT PETITIONER'S UNOPPOSED MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE HIS FIRST COUNSELED PET FOR WRIT OF HABEAS CORPUS IS GRANTED. PETITIONER WILL FILE HIS AMENDED PET FOR WRIT OF HABEAS CORPUS ON OR BEFORE SEPTEMBER 10, 2002 . (SIGNED

		BY JUDGE RONALD L. BUCK-WALTER) 6/25/02 ENTERED AND COPIES MAILED. (gm) (Entered: 06/25/2002)
09/03/2002	14	UNOPPOSED MOTION by PETITIONER MICHAEL PIERCE FOR EXTENSION OF TIME TO FILE FIRST COUNSELED PETITION FOR WRIT OF HABEAS CORPUS , CERTIFICATE OF SERVICE. (mbh) (Entered: 09/04/2002)
10/01/2002	15	UNOPPOSED MOTION BY PETITIONER MICHAEL PIERCE TO EXTEND TIME TO FILE FIRST-COUNSELED PET FOR WRIT OF HABEAS CORPUS , CERTIFICATE OF SERVICE. (gm) (Entered: 10/02/2002)
10/02/2002	16	ORDER THAT PETITIONER'S UNOPPOSED MOTION TO EXTEND TIME TO FILE FIRST-COUNSELED PET FOR WRIT OF HABEAS CORPUS IS GRANTED. PETITIONER WILL FILE HIS AMENDED PET FOR WRIT OF HABEAS CORPUS ON OR BEFORE OCTOBER 4, 2002 . (SIGNED BY JUDGE RONALD L. BUCKWALTER) 10/3/02 ENTERED AND COPIES MAILED. (gm) (Entered: 10/03/2002)

10/08/2002	17	ORDER THAT PETITIONER'S UNOPPOSED MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE HIS FIRST COUNSELED PETITION FOR WRIT OF HABEAS CORPUS IS GRANTED. PETITIONER WILL FILE HIS AMENDED PETITION FOR WRIT OF HABEAS CORPUS ON OR BEFORE DECEMBER 3, 2002 . (SIGNED BY JUDGE RONALD L. BUCKWALTER) 10/9/02 ENTERED AND COPIES MAILED. (gm) (Entered: 10/09/2002)
10/16/2002	18	ORDER THAT AFTER CONSIDERATION OF PETITIONER'S EXPARTE MOTION FOR AN ORDER TRANSPORTING PETITIONER FOR AN MRI AND PET SCAN AT THE UNIVERSITY OF PITTSBURGH MEDICAL CENTER IT IS HEREBY ORDERED: PETITIONER'S MOTION IS GRANTED; THE PA DEPT CORRS WILL TRANSPORT AND SECURE PETITIONER FOR THE ABOVE DESCRIBED TESTING AND EVALUATION AND WILL RETURN HIM THEREAFTER FROM WHENCE HE CAME; THAT TESTING WILL BE SCHEDULED BY PETITIONER'S COUNSEL, THROUGH THEIR EXPERTS, TO BE CONDUCTED AT A TIME CONVENIENT TO THE DEPT CORRS,

		ETC., THAT THE DEPT WILL ARRANGE FOR PETITIONER TO BE FREE OF METAL RESTRAINTS, ETC.; THAT THE CAPITAL HABEAS CORPUS UNIT OF THE FED COUERT DIV OF THE DEFD ASSOC OF PHILA WILL BEAR ALL COSTS, ETC.; THAT THIS MOTION AND ORDER WILL BE SEALED BY THE CLERK OF COURT; THAT PERSONNEL EMPLOYED BY THE PA DEPT CORRS WILL NOT DISCLOSE ANY ASPECT OF THIS MOTION OR ORDER TO ANY PERSON AFFILIATED WITH THE DIST ATTY OF PHILA COUNTY. (SIGNED BY JUDGE RONALD L. BUCKWALTER) 10/17/02 ENTERED AND COPIES MAILED. (gm) (Entered: 10/17/2002)
10/16/2002	19	EX-PARTE MOTION BY PETITIONER MICHAEL PIERCE FOR ORDER TRANSPORTING PETITIONER FOR AN MRI AND PET SCAN AT THE UNIVERSITY OF PITTSBURGH MEDICAL CENTER AND FOR AN ORDER SEALING THIS APPLICATION , CERTIFICATE OF SERVICE. (gm) (Entered: 10/17/2002)
10/31/2002	20	MOTION BY RESPONDENT(S) FOR RECONSIDERATION OF THIS COURT'S EX PARTE ORDER

		ENTERED OCTOBER 17, 2002 , CERTIFICATE OF SERVICE. (gm) (Entered: 11/01/2002)
11/04/2002	21	Response (answer) by PETITIONER MICHAEL PIERCE to respondents' MOTION FOR RECONSIDERATION OF THIS COURT'S EX PARTE ORDER ENTERED OCTOBER 17, 2002, Certificate of Service. (gm) (Entered: 11/05/2002)
11/13/2002	22	Reply by PETITIONER MICHAEL PIERCE to response to MOTION FOR RECONSIDERATION OF THIS COURT'S EX PARTE ORDER, cert of service. (gm) (Entered: 11/14/2002)
11/19/2002	23	ORDER THAT RESPONDENT'S MOTION FOR RECONSIDERATION OF THIS COURT'S EX PARTE ORDER ENTERED OCTOBER 17, 2002, IS GRANTED AND THIS COURT'S ORDER OF 10/17/02 IS VACATED (SIGNED BY JUDGE RONALD L. BUCKWALTER) 11/20/02 ENTERED AND COPIES MAILED. (cdd) (Entered: 11/20/2002)
11/25/2002	24	RENEWED MOTION by PETITIONER MICHAEL PIERCE FOR ORDER TRANSPORTING PETITIONER FOR A MRI AND PET SCAN , CERTIFICATE OF SERVICE. (gm) (Entered: 11/26/2002)

ORIGINAL

3

NO. 06-1298

Supreme Court, U.S.
FILED
APR 26 2007
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CONNOR BLAINE, Superintendent, State Correctional Institute at Greene,
THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY,
THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Petitioners,

v.

MICHAEL PIERCE,

Respondent.

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SUPREME COURT, U.S.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL WISEMAN
*Counsel of Record**
JAMES MORENO
Capital Habeas Corpus Unit
Federal Community Defender for the
Eastern District of Pennsylvania
Suite 545 West – The Curtis Center
Philadelphia, PA 19106
215-928-0520

Counsel for Respondent, Michael Pierce

Dated: Philadelphia, PA
April 26, 2007

*Admitted to the Bar of this Court

11/25/2002	25	UNOPPOSED MOTION BY PETITIONER MICHAEL PIERCE TO EXTEND TIME TO FILE FIRST-COUNSELED PET FOR WRIT OF HABEAS CORPUS , CERTIFICATE OF SERVICE. (gm) (Entered: 11/26/2002)
12/03/2002	26	ORDER GRANTING MOTION TO EXTEND TIME TO FILE FIRST-COUNSELED PET FOR WRIT OF HABEAS CORPUS, PETITIONER WILL FILE HIS AMENDED PETITION FOR WRIT OF HABEAS CORPUS ON OR BEFORE 12/10/02 (SIGNED BY JUDGE RONALD L. BUCKWALTER) 12/3/02 ENTERED AND COPIES MAILED. (jpd) (Entered: 12/03/2002)
12/10/2002	27	Relator's petition for writ of habeas corpus, volume I, volume II. (gm) (Entered: 12/11/2002)
12/17/2002	28	ORDER GRANTING PETITIONER'S RENEWED MOTION FOR ORDER TRANSPORTING PETITIONER FOR A MRI AND PET SCAN AT THE UNIV OF PITTSBURGH MEDICAL CENTER, ETC. SO ORDERED. (SIGNED BY JUDGE RONALD L. BUCKWALTER) 12/18/02 ENTERED AND COPIES MAILED. (gm) (Entered: 12/17/2002)

		ENTERED AND COPIES MAILED. (kw,) (Entered: 01/12/2004)
01/14/2004	--	NOTICE of Docketing Record on Appeal from USCA re [43] Notice of Appeal, filed by THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, CONNOR BLAINE. USCA Case Number 04-9000. (fb) (Entered: 01/15/2004)
01/23/2004	46	Copy of TPO Form re [43] Notice of Appeal, : (stb,) (Entered: 01/23/2004)
01/26/2004	--	RECORD COMPLETE FOR PURPOSES OF APPEAL. (mac,) (Entered: 01/26/2004)
02/09/2005	47	ORDER THAT THE CLERK OF COURT MARK THIS ACTION CLOSED FOR STATISTICAL PURPOSES AND PLACE THE MATTER IN THE CIVIL SUSPENSE FILE, ETC.. SIGNED BY JUDGE RONALD L. BUCKWALTER ON 2/9/05. 2/9/05 ENTERED AND COPIES E-MAILED.(fb) (Entered: 02/09/2005)

02/10/2003	29	Notice of filing of supplemental affidavits and reports by PETITIONER MICHAEL PIERCE, certificate of service. (fb) (Entered: 02/10/2003)
02/10/2003	30	Petition of PETITIONER MICHAEL PIERCE for involuntary commitment to a forensic psychiatric facility for long-term evaluation, Certificate of Service. (fb) (Entered: 02/10/2003)
03/07/2003	31	MEMORANDUM AND ORDER THAT THE PETITION FOR INVOLUNTARY COMMITMENT TO A FORENSIC PSYCHIATRIC FACILITY FOR LONG-TERM EVALUATION IS DENIED WITHOUT PREJUDICE. A STATUS CONFERENCE IS SCHEDULED FOR 3/26/03 AT 9:30 A.M. IN COURTROOM 14A. (SIGNED BY JUDGE RONALD L. BUCKWALTER) 3/10/03 ENTERED AND COPIES MAILED. (fb) (Entered: 03/10/2003)
03/31/2003	32	UNOPPOSED MOTION BY RESPONDENT CONNOR BLAINE, RESPONDENT THE D.A.OF PHILA CTY, RESPONDENT THE ATTY GEN OF PA FOR PRODUCTION OF DEPARTMENT OF CORRECTIONS RECORDS , CERTIFICATE OF SERVICE. (fb) (Entered: 04/01/2003)

04/07/2003	33	ORDER THAT UPON CONSIDERATION OF RESPONDENTS' UNOPPOSED MOTION FOR PRODUCTION OF DEPARTMENT OF CORRECTIONS RECORDS, IT IS ORDERED THAT THE PA. DEPARTMENT OF CORRECTIONS PRODUCE TO RESPONDENTS COPIES OF: ANY DOCUMENT THAT THE DEPARTMENT OF CORRECTIONS SENT TO THE PETITIONER, MICHAEL PIERCE ETC (SIGNED BY JUDGE RONALD L. BUCKWALTER) 4/7/03 ENTERED AND COPIES MAILED (ph) (Entered: 04/07/2003)
07/01/2003	34	PETITIONER'S MOTION FOR ORDER AUTHORIZING RELEASE OF PETITIONER'S RECORDS FROM THE PENNSYLVANIA DEPARTMENT OF CORRECTIONS FILED BY MICHAEL PIERCE, CERTIFICATE OF SERVICE.(ar,) (Entered: 07/02/2003)
07/16/2003	35	ORDER: PETITIONER'S MOTION FOR AN ORDER AUTHORIZING RELEASE OF PETITIONER'S RECORDS FROM THE PA DEPT. OF CORRECTIONS IS GRANTED, ETC.. SIGNED BY JUDGE RONALD L. BUCKWALTER ON 7/16/03.7/17/03 ENTERED AND COPIES MAILED. (fb) (Entered: 07/17/2003)

08/22/2003	36	RESPONSE to Motion re [34] MOTION for Order for Involuntary Commitment filed by THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, Certificate of Service. (DOLGENOS, THOMAS) Modified on 8/25/2003 (np). (Entered: 08/22/2003)
08/25/2003	37	EXHIBITS by CONNOR BLAINE, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY to response to MOTION FOR INVOL-UNTARY COMMITMENT.(fb) (Entered: 08/26/2003)
09/12/2003	38	PETITIONER, MICHAEL PIERCE'S Reply to Respondents' Response regarding the Motion for Involuntary Commitment, Certificate of Service. (fdc) (Entered: 09/15/2003)
10/03/2003	39	MEMORANDUM AND ORDER THAT PETITIONER BE COMMIT-TED TO A SECURE PSYCHIATRIC FACILITY FOR PURPOSES OF A LONG-TERM PSYCHIATRIC EVALUATION. IT IS FURTHER ORDERED THAT A COMPLETE COPY OF PETITIONER'S RECORDS FROM THE PA DEPARTMENT OF CORRECTIONS, AND THE REPORTS OF DRS. SADOFF, ROTENBERG, FOX AND

		TEPPER BE PROVIDED TO THE EVALUATORS FOR THEIR CONSIDERATION AND REVIEW. SIGNED BY JUDGE RONALD L. BUCKWALTER ON 10/3/03. 10/6/03 ENTERED AND COPIES MAILED. (fb) (Entered: 10/06/2003)
10/20/2003	40	MOTION FOR RECONSIDERATION, OR IN THE ALTERNATIVE TO PERMIT AN IMMEDIATE APPEAL, FILED BY RESPONDENTS' THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, CONNOR BLAINE, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, CERTIFICATE OF SERVICE. (DOLGENOS, THOMAS) Modified on 10/21/2003 (fh) (Entered: 10/20/2003)
11/05/2003	41	Answer to RESPONDENTS' MOTION FOR RECONSIDERATION, OR, IN THE ALTERNATIVE, TO PERMIT AN IMMEDIATE APPEAL filed by MICHAEL PIERCE, certificate of service. (fb) (Entered: 11/06/2003)
12/19/2003	42	MEMORANDUM AND ORDER THAT RESPONDENT'S MOTION FOR RECONSIDERATION, OR IN THE ALTERNATIVE, TO PERMIT AN IMMEDIATE APPEAL IS

		DENIED. A STATUS CONFERENCE IS SCHEDULED FOR 1/7/04 AT 4:30 P.M. IN THE CHAMBERS OF THE UNDERSIGNED. SIGNED BY JUDGE RONALD L. BUCKWALTER ON 12/18/03. 12/23/03 ENTERED AND COPIES MAILED. (fb) (Entered: 12/23/2003)
01/07/2004	43	NOTICE OF APPEAL as to 42 Order, by CONNOR BLAINE, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY. Filing fee $ 255, receipt number 900880. Copies to Judge, Clerk USCA, Appeals Clerk and THOMAS W. DOLGENOS, JAMES MORENO, MICHAEL WISEMAN, certificate of service. (fb) (Entered: 01/08/2004)
01/08/2004	44	Clerk's Notice to USCA re [43] Notice of Appeal. (fb) (Entered: 01/08/2004)
01/09/2004	--	Certified and Transmitted Record on Appeal to US Court of Appeals. (Pleadings #18,#19 not included) (mac,) (Entered: 01/09/2004)
01/09/2004	45	ORDER THAT THE COURT STAYS THE IMPLEMENTATION OF ITS ORDER DATED 10/3/03. SIGNED BY JUDGE RONALD L. BUCKWALTER ON 1/7/04. 1/12/04

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Did the District Court properly order the transfer of a capital habeas corpus petitioner from a state prison to a secure mental health facility to determine whether he is competent to proceed with his litigation, when his appointed attorneys presented overwhelming and undisputed evidence that he is psychotic and likely incompetent and where the state did not challenge the evidence of mental illness through given the opportunity to do so?

(Answered affirmatively by the Court of Appeals for the Third Circuit)

2. Did the Court of Appeals for the Third Circuit properly conclude that the order of the District Court was not subject to interlocutory appeal because it did not implicate any of the exceptions to the rule of Cohen v. Beneficial Industries Loan Corp., 337 U.S. 541 (1949).

(Answered affirmatively by the Court of Appeals for the Third Circuit)

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COUNTER STATEMENT OF THE CASE[1]

A. Introduction.

Contrary to Petitioners' assertions, this case does not present a controversial question. This case is not about "the national debate over the death penalty." *Petition For Writ of Certiorari*, at 14 (hereafter, *Petition*). Nor does it present "a disquieting paradigm" in the implied distortion of capital jurisprudence. Id. The District Court's order is not a so-called "Vitek commitment order" since, as the Court of Appeals noted, "Vitek involved an open-ended civil commitment and involuntary treatment unrelated to any ongoing court proceedings rather than an inpatient evaluation for the limited purpose of determining competence to assist counsel." Pierce v. Blaine, 467 F.3d 362, 371 (3rd Cir. 2006).

This case does not present an issue of involuntary treatment, forcible medication or any other invasive procedure. Rather, the District Court ordered a routine competency evaluation based upon "reasonable cause" to believe Mr. Pierce may be incompetent and unable to rationally assist current habeas counsel. When the order is implemented, "[P]ierce will be transferred for observation and evaluation. He may voluntarily agree to be interviewed . . . or he may even agree to some form of therapeutic intervention, but if he refuses to participate, then all that will happen to him is that he will be housed in a custodial setting and observed, just as he is now." Pierce, 467 F.3d at 371.

Petitioners (the Commonwealth of Pennsylvania, hereinafter referred to as the Commonwealth) ignore the overwhelming evidence of Mr. Pierce's incompetence and instead insist that the District Court was bound by stale and inadequate competency determinations made in the state courts well over a decade prior to the District Court's order. Moreover, the law relied by the

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[1]All emphasis herein is supplied unless otherwise noted.

upon by the Commonwealth is neither applicable nor even analogous to the situation presented in this case, as the Third Circuit held.

For example, contrary to the Commonwealth's assertion that none of Mr. Pierce's state court counsel believed him to be incompetent and delusional, Pierce's trial counsel, argued to the jury that Pierce was "acting under some delusional state" and that "that he did not understand what he was doing," recognized Mr. Pierce to be profoundly mentally ill. Pierce, 467 F.3d at 364 (trial counsel "[i]mplored the jury to consider that Pierce was out of touch with reality and mentally ill at the time of the offense, but she did not seek to have Pierce evaluated by a mental health professional, nor did she seek a competency evaluation or an inpatient commitment").[2]

Indeed, the Court of Appeals, upon review of the entire record, concluded that "Pierce's competence to stand trial and unyielding negative views about a psychiatric approach to his defense were issues from the beginning of the criminal proceedings." Pierce, 467 F.3d at 364.

Contrary to the Commonwealth's arguments, this case does not implicate deference to prior state court findings of competence because there was never a state court hearing conducted on the subject of his competence.[3] Although a brief competency evaluation took place in 1989,[4] the "presumption of correctness, even for [a] purely historical fact ... does not apply when some reason

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[2]Mr. Wallace, another one of Mr. Pierce's state court attorneys, twice moved for a competency evaluation.

[3]Mr. Pierce was not repeatedly found competent by the state court. *Petition*, at 5 ("Pierce was repeatedly found competent to make his own decisions"). The only notation in the state court record concerning competency is a statement made by the prosecutor during a pre-trial hearing that "on 12/8/89, the defendant was found competent, and Mr. Wallace requested a continuance for further preparation." Notes of Testimony (hereafter, NT) 10/16/90, 20.

[4]Although three competency evaluations were ordered, Pierce refused to participate in all but one. This evaluation took place on November 20, 1989.

to doubt the adequacy or the accuracy of the fact-finding proceeding exists." Barnett v. Hargett, 174 F.3d 1128, 1136 (10th Cir. 1999) (internal quotation marks omitted); see also Miller-El v. Cockrell, 545 U.S. 231 (2005). Even if the state court finding was based on otherwise proper procedure, this finding is unquestionably stale; stands contradicted by the wealth of more recent evidence presented to the District Court; it was reached without benefit of any collateral data, records, or family history about Mr. Pierce (other than a print out of the charges he faced); and is of dubious value. See Brown v. Sternes, 304 F.3d 677, 697 (7th Cir. 2002) (competency evaluation conducted without information concerning defendant's background and medical history renders conclusion of competency "[u]seless and unreliable").[5] See also Appel v. Horn, 250 F.3d 203, 216-17 (3d Cir. 2001) ("Nor do we believe it would impose an undue burden on defense counsel to require some investigation into the defendant's competency, especially in a capital murder case where the trial court has ordered a competency evaluation and hearing").

Moreover, the state court findings of competency – such as they are – are far from reassuring, as demonstrated by the state court's inability to recognize blatant indica of mental illness and delusional, paranoid thought content expressed by Mr. Pierce in his one and only colloquy in state court, where he was questioned concerning his desire to discharge yet another attorney:

> That's what I wanted to tell you. I wanted to say this on the record, but I will say it now, I wanted to say it, it's really disturbing, like you could have a problem between staff and prisoners, **but since I have been filing my habeas corpus in February of 1998, I've been threatened by the prison guards, even before that, they would kill me if I didn't stop appealing my criminal appeal.**
>
> And I brought this to the attention of the prison staff, and I filed two lawsuits. One

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[5]The court in Brown also noted that "[i]t is the imprecise nature of the science known as psychiatry that makes review of the past available psychiatric records an essential part of defendant's competency to stand trial." Brown v. Sternes, 304 F.3d at 696.

is pending in the Third Circuit Court of Appeals and the other is in the U.S. District Court in the Western District of Pennsylvania in federal court. **They threatened to kill me, threatened to rape me while I'm asleep on medication**.

NT 11/10/99, 9-10. Despite the deluded nature of Pierce's response, and his assertion that guards were threatening to kill him if he proceeded with his appeals, the state post-conviction found him competent to make this "knowing, intelligent and voluntary" waiver of his right to counsel.[6]

The Court of Appeals correctly concluded that the District Court's order committing Mr. Pierce to a secure psychiatric facility for an evaluation of his competency to rationally assist habeas counsel does not fit within the narrow confines of the collateral order doctrine and thus is not appealable. Pierce, 467 F.3d at 368. Rather, the District Court, presented with what the Court of Appeals characterized as "a reasonably strong showing that Pierce was acutely ill in 2002" at the time the *Petition for Involuntary Commitment* was presented to it, properly ordered an in-patient competency evaluation based upon the extensive record before it. See *District Court Memorandum* (A-10)[7] ("The record attached to the petition...gives rise to the belief that Petitioner might presently be incompetent and thus unable at present to rationally assist counsel"); Pierce, 467 F.3d at 367 ("Finally, Dr. Fox expressed opinions...importantly for our purposes here, that [Pierce] is currently unable to assist habeas counsel. He added that if he had seen Pierce in a civil context, he would have opined that Pierce required a conservator or guardian to prosecute, protect or handle his affairs").

The Commonwealth, on the other hand, does not want Mr. Pierce examined for competency. Nor does it wish for mental health professionals to review the voluminous and uncontradicted

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[6]Mr. Pierce has attempted to dismiss every single lawyer appointed to represent him, including undersigned counsel.

[7]Citations that begin with "A" refer to the Appendix filed in the Court of Appeals by the Commonwealth in connection with its interlocutory appeal.

records, witness statements and affidavits proving Mr. Pierce was profoundly mentally ill and impaired before, at and after the time of his capital trial. And the Commonwealth particularly does not want any mental health professional to spend an extended period of time speaking with or observing him. Such evaluations will likely lead to a finding that Mr. Pierce is not competent to proceed. The Commonwealth's self-serving invocation of Pierce's liberty interest and right to due process is disturbing and perverse – after all, the Commonwealth seeks to execute him. There is nothing about the District Court's order that implicates those concerns, and, in any event, the Commonwealth has no standing to raise them.

B. Relevant Procedural History.

Michael Pierce is a death-sentenced prisoner in the custody of the Commonwealth of Pennsylvania. On October 30, 1990, he was convicted of three counts of first-degree murder, arson, aggravated assault, recklessly endangering another person, and risking a catastrophe as a result of a fire that killed his parents and grandmother. After a brief penalty hearing he was sentenced to death.

The Pennsylvania Supreme Court denied Petitioner's direct appeal. Commonwealth v. Pierce, 645 A.2d 189 (Pa. 1994). The state trial court denied post-conviction relief and that denial was affirmed on appeal by the Pennsylvania Supreme Court. Commonwealth v. Pierce, 786 A.2d 203 (Pa. 2001).

On January 31, 2002 Mr. Pierce filed a *pro se* petition for a federal writ of habeas corpus. The District Court appointed undersigned counsel to represent Mr. Pierce in his capital habeas corpus proceeding. Counsel, who had no prior involvement with Mr. Pierce or his case, began to do what post-conviction counsel are required to do in cases such as this: they repeatedly met their

client and tried to speak with him about his case; they gathered records about him, including researching a number of prior law suits that he filed and obtaining records maintained by the prison authorities; they interviewed family members and those who knew him before the offenses; and they reviewed the state court proceedings. After taking these basic steps, counsel found indisputable evidence that their client is severely mentally ill and incompetent to assist counsel in the litigation of his habeas petition. It became clear to counsel that Mr. Pierce was incompetent and that his mental illness prevented him from understanding or assisting in his litigation.

Accordingly, undersigned counsel filed with the District Court a *Petition For Involuntary Commitment To A Forensic Psychiatric Facility For Long-Term Evaluation* (hereinafter *Petition For Involuntary Commitment*). Specifically, counsel asked the District Court to "[t]ake appropriate steps to have Petitioner evaluated to determine his competency to proceed in this litigation." *Petition For Involuntary Commitment*, at 1(District Court Document # 30).

The District Court, after reviewing the overwhelming documentary evidence presented by undersigned counsel, including contemporaneous reports from four mental health professionals (Drs. Fox, Sadoff, Rotenberg and Tepper) granted the *Petition For Involuntary Commitment* and "invited the Commonwealth to identify a forensic psychiatrist to participate in an evaluation of Pierce's current competence to participate in his capital habeas litigation." Pierce, 467 F.3d at 367. The Commonwealth declined to do so, and instead filed a motion for reconsideration. In denying this motion, the District Court stated the obvious: "it seems to me that reasonable people would agree that based upon the record in this case, the petitioner needs the evaluation ordered by the court..." Id.

As the following summaries show, the evidence is clear that Mr. Pierce is mentally ill,

delusional and psychotic. All of the following materials were provided to the District Court in support of the counsels' request that Mr. Pierce be temporarily committed for a mental health evaluation to determine competency.

C. Evidence of Mr. Pierce's Current Incompetence.

In preparing to file the Petition for a Writ of Habeas Corpus, undersigned counsel gathered the following evidence showing that Mr. Pierce is not competent, or at a minimum, his competency must be inquired into before the District Court could further proceed.

1. Counsels' Communications with Mr. Pierce.

Counsel and their investigator, Cindy Rowe, met with Mr. Pierce on numerous occasions. These meetings were fruitless because Mr. Pierce was not able to discuss his case in a rational way. Investigator Rowe recalls her meetings with Mr. Pierce, and how, instead of discussing his case, he stated that:

> [H]e is being tortured, raped and experimented on by a host of government entities, including personnel from SCI Greene Prison, the FBI, the Justice Department, The State of Pennsylvania and the City of Philadelphia.

Declaration of Cindy Rowe, A-509. Ms. Rowe's declaration also describes how Mr. Pierce believed that all attorneys who have ever represented him in his capital case "were all working in conjunction with the Commonwealth to secure his conviction and insure the carrying out of his death." Id. He told Ms. Rowe that he was being "sodomized nightly by prison staff" (id.); that prison guards were making "alterations" to the "structure of his face;" that "hair was being removed from various parts of his body via electrolysis" (id.); and that a "computer chip capable of monitoring and controlling his thoughts was implanted in his brain when he was sent to a hospital by the Department of Corrections." A-510. Ms. Rowe recounted how Mr. Pierce confused time frames, and was not sure

of the year that they had met. He told her that he'd met her two years before they actually met for the first time. A-512. Ms. Rowe concluded:

> It has been impossible to work with Mr. Pierce on the substance of his capital case. In all of the time I spent with him, he was unable to relate to me any non-delusional information related to his case, other than repeating that all of the witnesses had lied. His entire focus was on the conspiracy against him by his attorneys and on the behavior of guards, and the government . . . Without question, in my mind, he was not able to rationally assist me in my attempts to help him.

A-513. His meetings with counsel were similar. *See Petition for Involuntary Commitment* at ¶ 44.

2. Civil Law Suits Filed by Mr. Pierce.

Counsel also researched Mr. Pierce's legal history. What counsel found was significant. Mr. Pierce has filed numerous civil law suits in federal court, each of which is notable for its delusional content. He has alleged that prison guards anesthesize him while he sleeps and perform bizarre surgical procedures on him designed to alter his appearance, such as plastic surgery and hair removal. See Pierce v. William J. Love, J.C. Blair Medical Center, Doctor Reinhart, June 24, 1993 (M. D. Pa.) (Complaint) ("highly sofisticated (sic) electronic devices were placed under plaintiff's skin" by guards) (A-450); Pierce v. Sgt. Markley, CO Hyde and Love, June 24, 1993 (M.D. Pa.) (Complaint) ("Plaintiff was sexually violated by prison staff members CO Hyde & Sergeant Markley on the 2pm to 10pm shift of B-Block by drugging plaintiff's food & performing an illegal cavity search, which caused plaintiff to bleed from rectum and continued to do so over a period of one and a half years") (A-454); Pierce v. Love, 1992 WL 220983 at *1 (E.D. Pa. Aug. 31, 1992) (Petitioner alleging that he has been "mutilated" by correctional personnel cutting off his hair without permission) (A-456).

United States Magistrate-Judge Benson (sitting in the United States District Court for the

Western District of Pennsylvania, where Mr. Pierce has been incarcerated for much of his time on death-row) has adjudicated many of Mr. Pierce's civil complaints. In Pierce v. Johnson, 98-1787 (W.D. Pa. December 7, 1998), Magistrate Benson summarized Pierce's allegations as follows:

> [H]e began noticing some bruises and scrapes on his arms and legs when he woke up. He claims that typically this occurred when he was given medication in powder form. . . [P]laintiff woke up with what appeared to be a human bite mark on his left leg and a bruise on his right leg. **Plaintiff fears that prison staff are drugging him and injuring him in his sleep**. . . [P]laintiff alleges that he 'mysteriously' contracted poison ivy or poison oak or poison sumac in February of 1998, which was misdiagnosed as atypical dermatitis, that a very strong chemical smell[8] was coming into his cell in August of 1998 and that a guard continued to shine a pen light into his eyes after he complained that the light might damage his eyes. Plaintiff complains that although he has not had a haircut since early 1993, his hair grows mysteriously shorter.

Magistrate-Judge's Report and Recommendation, at 3 (A-468).

In another, more recent, action, Pierce v. Blaine, Civil Action No. 00-2275 (W.D. Pa. April 3, 2001) Magistrate-Judge Benson wrote:

> [P]laintiff makes the same type of **fantastical** allegations that he has been asserting in the federal courts since at least 1992. *See, e.g., Pierce v. Love*, 1992 WL 220983, at *1 (E.D. Pa. August 31, 1992) ("Plaintiff alleges that 'since being sentenced and arriving at state institution I have been subjected to general harassment, terrorism, libel, theft of personal property, and mutilation to humiliate me (by cutting off sections of my hair)' . . . In addition, plaintiff alleges that: (he has been given poison ivy on numerous occasions although he does not go outside; 2) his left nostril was enlarged by 1/8 inch, which had to have been done by a laser; 3) a strong chemical smell comes into his cell from the vent; 4) his eye was damaged when a laser pen light was used to check a tear duct; and 5) a substance was put on his face and cheeks, which made his smile look lecherous.'").

Magistrate-Judge's Report and Recommendation at 2 (A-479).

When Mr. Pierce appealed the adverse disposition of this suit, **Pennsylvania's Attorney**

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[8]Petitioner proffered in the District Court that olfactory hallucinations are symptomatic of schizophrenia. *Petition*, at ¶ 28, n.6.

General aptly characterized his allegations as "**delusional and fantastical.**" *Reply in Opposition to Plaintiff's Motion for Imminent Danger Exception to PLRA*, filed in *Pierce v. Blaine*, 01-3054 (3d Cir. August 22, 2001) (A-485).[9]

3. Records Maintained by the Pennsylvania Department of Corrections.

Counsel obtained mental health and medical records complied by mental health and medical providers, counselors and guards, employed by the Pennsylvania Department of Corrections ("DOC"). Since the purpose of these records was to monitor and treat – if possible – Mr. Pierce's behavior and mental illness, the conclusions contained within them are particularly probative of his mental impairments and incompetency. Excerpts from these records, spanning about a decade, are summarized as follows[10]:

1/3/92, Referral to Neurologist, head injury in prison riot in October 1989 (A-317);

9/30/92, Psychiatrist, "**hallucinations and paranoid ideation**"(A-313);

10/16/92, Psychiatrist, "still hearing voices...making comments which are somewhat upsetting" (A-311);

7/16/93, Psychiatrist, "**claims that Cos[11] are cutting off his hair and persecuting him.** Sounds like suspiciousness associated with paranoid thinking..."(A-302);

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[9]Mr. Pierce had been previously sanctioned pursuant to 28 U.S.C. § 1915(g) for filing three or more lawsuits that were found to be frivolous, malicious or which failed to state a claim. He was thus only permitted to file a new suit if he alleged that he was in "imminent danger of serious physical injury." Id.

[10]The Cumulative Adjustment Reports from April 23, 2003 through August 1, 2003 are not included in the *Joint Appendix*. However, they were provided to the District Court as an attachment to *Petitioner's Reply to Respondents' Response Regarding Motion for Involuntary Commitment* (District Court document # 38). Petitioner has included them in a *Supplemental Appendix*, filed with the Court of Appeals.

[11]Shorthand reference to "corrections officers."

12/3/93, Psychiatrist, "he has gotten into some difficulties for trying to mail **underwear that was bloodstained out of the institution claiming it was evidence**" (A-294);

2/24/94, Psychiatrist, "takes meds to prevent delusional thinking"(A-294);

12/8/94, Individual Tx Plan, "Mellaril 100mgs; claims his attorney is working with the prosecuting attorney" (A-279);

3/10/95, Psych Report, "Mellaril 150 mgs (Notes that 100 mg insufficient dose to keep away psychotic symptoms" (A-278);

9/11/96, Health Information, history of substance abuse including cocaine and ETOH (SA-004);

12/3/98, Cumulative Adjustment Record, "**Anxious, suspicious, projections, fragmented memory; thought impairment** (A-271);

12/31/98, Cumulative Adjustment Record, "**impairment in thought**" (A-270);

1/28/99, Cumulative Adjustment Record, "Anxious affect; **impairment in fact**" (A-270);

7/6/99, Cumulative Adjustment Record, "he often presents an **intact delusional system** that occasionally causes him stress" (A-265);

7/13/99, Cumulative Adjustment Record, "**thought process delusional in nature**" (A-264);

8/30/99, Psychology Department Referral Form, "[H]e believes staff are cutting his hair while he sleeps. **Inmate exhibits signs of delusional thought processes and growing paranoid in regards to treatment by staff**" (A-256);

11/2/99, Cumulative Adjustment Record, "**impaired to reasonable decisions**" (A-258);

12/26/06, Cumulative Adjustment Record, "**delusional thought pattern**" (A-261);

2/20/01, Cumulative Adjustment Record, "**His speech is rambling in nature making accusatory** statements about the actions of staff towards him. **Thought content was not logical in nature. Refused any psychiatric intervention**" (A-253);

11/1/01, Cumulative Adjustment Record, "**continues to present paranoid thought**

patterns" (A-250);

1/15/02, Cumulative Adjustment Record, "**Bizarre appearance, anxious, suspicious, projections, memory fragmented, impaired thoughts and feeling. Narrative: exhibits paranoid symptoms claiming that writer lies about his situation**";

4/23/03, Cumulative Adjustment Record, "**Still claims that he is being raped and sodomized, hair is being cut, mail is being stolen, claims staff is false** (SA-001);

7/24/03, Cumulative Adjustment Record, "Food trays being tampered with" (SA-002) (emphasis added).

4. State Court Proceedings.

The state court record (both trial and post-conviction) reveals significant indicia of Mr. Pierce's mental illness.

a. Witness Statements and Testimony Showing Mental Illness.

Mr. Pierce's sister, Joan Pierce, testified for the Commonwealth both pre-trial and at trial, that Mr. Pierce believed his parents were trying to poison him by placing steroids and drugs in his food. NT 8/10/89, 10, 22.

Ms. Pierce also testified to Mr. Pierce's bizarre behavior just days before the offense when she found her brother lying drunk in a deserted building on the grounds of the vacant Byberry State Hospital. NT 10/24/90, 62. She testified that earlier that night Mr. Pierce had consumed at least eight cans of beer. Id. at 53. She found him propped up against the wall, oblivious to the melting wax dripping onto his head from a candle he had earlier lit. Id. at 63. Other than the candle, the only other possession he had with him was a bag of beer. Id. at 64.

Timothy O'Reilly was with Joan Pierce when she found Mr. Pierce, whom he described as "[a]ll in the bushes with stickers and wax all over him and dirt, and he was messed up . . . beyond

drunk." NT 10/29/90, 517.

Indicia that Mr. Pierce suffered psychiatric problems were also apparent from review of the discovery provided to trial counsel by the Commonwealth. Mr. O'Reilly told the police that Mr. Pierce had been treated in the past by psychiatrists and also described Mr. Pierce's rambling and nonsensical rantings in the days before the offense. *See Investigation Interview Record of Timothy O'Reilly*, dated July 10, 1989, at 6 (A-432). Mr. O'Reilly also described Mr. Pierce's delusional paranoid belief that his parents were conspiring against him:

> He is **paranoid** about them, he always says that they are conspiring against him to keep him from getting a good job. He has gone back and forth between here and Los Angeles and he would say that they are **conspiring** against him out there.

Id. at 1 (A-427). Additionally, Mr. O'Reilly told police that Mr. Pierce had discussed killing his parents and committing suicide.[12] Id. Finally, Mr. O'Reilly described how, the week before the fire, Mr. Pierce had destroyed all of his furniture and stereo equipment in order to keep it out of the hands of his parents:

> [h]e had furniture in their house from when he was married and in L.A.. Before he left from his parents house, he broke up the furniture, slashed it up, smashed up his tape deck, slashed his speakers and broke his receiver; he slashed his leather sofa. He said it was so the enemy (his parents) wouldn't have them.

Id. at 2 (A-428). Given that Mr. Pierce did not have a job, a place to live or any other source of income, his bizarre insistence that he destroy his belongings and his talk of suicide also were indications of his illness.

Days before the offense, Mr. Pierce reportedly told Tim O'Reilly's mother, Margaret O'Reilly, that he would have no peace as long as his parents were alive. He talked about harming

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[12] Evidence of suicidal ideation is a red flag for incompetence. See Drope v. Missouri, 420 U.S. 162, 182 (1975).

them. When she challenged him that if he did something he would get caught, Mr. Pierce responded with the bizarre suggestion that he would not be caught because he intended to flee to Indonesia, "because I figure I'd blend in better there" (NT 10/25/90, 193).

b. State Court Competency Proceedings and Relationships with State Court Counsel.

Mr. Pierce's paranoia and impaired mental health dominated his relationships with the attorneys who tried to represent him in state court. Mr. Pierce moved to have two appointed lawyers discharged before trial, because he believed that each was involved in a conspiracy with the prosecution. See *Motion To Withdraw As Court-Appointed Counsel*, dated September 21, 1989, at 1 ("That defendant has telephoned [counsel's] office and left messages alleging that [counsel] is assisting the District Attorney's Office") (A-437).

Michael Wallace was one of the pre-trial lawyers assigned to Mr. Pierce. He believed that Mr. Pierce was incompetent to proceed. Pursuant to Mr. Wallace's request, the state trial court ordered a pre-trial competency determination, which was conducted by Eric Becker, M.D. in November, 1989. This "evaluation" consisted of nothing more than a brief mental status exam. The "information" relied upon by Dr. Becker consisted of a computer-generated "rap" sheet. Dr. Becker opined that Mr. Pierce was competent to proceed to trial (A-62-65)

Understandably unsatisfied, Mr. Wallace made a second request for a competency evaluation. The request was granted and Dr. Pietro Miazzo attempted to assess Mr. Pierce. Again, the reviewing doctor had no collateral information and this time Mr. Pierce refused to cooperate. (A-66–69).

Janis Smarro, the lawyer who eventually tried Mr. Pierce's case, also knew that Mr. Pierce was out of touch with reality and mentally ill. She told the jury so in her penalty phase summation:

> You have to ask yourselves, ladies and gentlemen, **whether...at the time of this incident and the moments before this incident and the week before this incident and even today, Mr. Pierce isn't acting under some delusional state** to, Mr. Pierce, what he believed was real, and that became his reality.
>
> * * *
>
> [i]n his mind, what he believed was reality, you can find that, ladies and gentlemen, to be such a state **that he did not understand exactly what he was doing, that he was suffering from some delusional state, that he was mentally ill...**
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> * * *
>
> **There was no reality to what Michael Pierce believed**, but he accepted it as true, and I think it was under that state of mind that he committed this act...

NT11/1/90, 1007-08.

Despite these significant indicia of mental illness, and aside from the brief and inadequate evaluation conducted by Dr. Becker, Mr. Pierce was never evaluated by a mental health professional during his state court trial or post-conviction proceedings. The state courts simply allowed him to proceed despite multiple indicia of incompetence, and without a comprehensive or reliable evaluation.

The state court's disregard for Mr. Pierce's disturbed condition is best illustrated by the first and last occasion in which a state court inquired into his competency to make litigation decisions. This occurred in 1999 when Mr. Pierce appeared to waive his right to counsel in regard to a state post-conviction appeal. Mr. Pierce wanted to discharge his state post-conviction appellate attorney (Jules Epstein) and proceed *pro se* on appeal. He appeared before the Honorable David N. Savitt, judge of the Court of Common Pleas in Philadelphia. Judge Savitt asked Mr. Pierce if "anyone promised you anything or threatened you in any way" to waive counsel (NT 11/10/99, 9) (A-544). Mr. Pierce gave the following answer:

> That's what I wanted to tell you. I wanted to say this on the record, but I will say it

> now, I wanted to say it, it's really disturbing, like you could have problems between staff and prisoners, but since I've been filing my habeas corpus in February of 1998, **I've been threatened by the prison guards, even before that, they would kill me if I didn't stop appealing my criminal appeal.**
>
> And I brought this to the attention of the prison staff, and I filed two lawsuits. One is pending in the Third Circuit Court of Appeals and the other is in the U.S. District Court in the Western District of Pennsylvania in Federal Court. **They threatened to kill me, threatened to rape me while I'm asleep on medication.**

(Id., 9-10) (A-544-545).

Remarkably, despite Mr. Pierce's stated belief that guards were threatening to kill and rape him if he did not drop his appeal, the state court **failed to make any inquiry** into these incredible statements: the court allowed Mr. Pierce to discharge counsel and proceed to the Pennsylvania Supreme Court unrepresented – and profoundly mentally ill. The denial of his post-conviction petition was affirmed with this mentally deranged individual acting as his own counsel. *See Commonwealth v. Pierce,* 786 A.2d 203 (Pa. 2001).

c. Additional Pre-Offense Evidence of Michael Pierce's Pre-Morbid Mental Illness.

In their investigation into Mr. Pierce's background, undersigned counsel found additional indicia of his pre-morbid mental deterioration. Although a loner for his adult life, Mr. Pierce had a smattering of acquaintances. One such person is John Carr, who knew Mr. Pierce in high school and from their time together in the Navy. Mr. Carr gave undersigned counsel some insight into Mr. Pierce's decline in the years leading up to the offense:

> I met Michael Pierce in the 1970s when we were both attending Archbishop Ryan High School in Philadelphia. Michael and I later entered the Navy and went through basic training together.
>
> Throughout our high school years, Michael was somewhat of a loner. . . I did not see Michael for a while after the navy. When I did see him, it was in the late 1980s . .

> . Michael looked worse than I had ever seen him. He was disheveled, it looked as though he had not showered in some time, his face looked like it was sunken in, and his hair was a mess.
>
> After Michael's arrest, I started receiving bizarre letters from him. He wrote about employees of the prison drugging him and cutting his head and beard hair, implanting hair in other parts of his body, and of computer ships [sic] being implanted in his head.

Declaration of John Carr, ¶ ¶ 1, 2, 4 & 5 (A-534).

Mr. Pierce's brother, John Pierce, also provided undersigned counsel with a view of Mr. Pierce's pre-offense deterioration. "From 1985 through 1989, Michael seemed to be deteriorating. He lost his job at the post office, he lost his car, his marriage ended, he was having continuing problems with our parents and seemed more frustrated than ever. He also stopped taking care of himself." Declaration of John Pierce, ¶ 5 (A-532–533).

For a number of years prior to the offense, Mr. Pierce worked for the United States Postal Service. In the time just before the offense, as his behavior in general deteriorated, his behavior towards postal customers and his supervisors became increasingly disturbed. He stopped keeping regular attendance, for which he was disciplined. He began to act in an odd manner which manifested itself in "angry outbursts" toward customers and supervisors. In May, 1986 he was disciplined as the result this disturbed exchange with a postal customer:

> Mrs. Betty Smith, a postal patron at 3850 Woodhaven Road, Phila., Pa., advised that on Saturday, May 31, 1986 at approximately 2:43 P.M. she attempted to speak with you in reference to a notification slip left for Certified letter. She states that you did not ring the bell or knock at the door. As she ran down Woodhaven Road, she saw you come out of the bushes and she called to you. You turned, saw her, and began to walk faster. She called to you again; you turned around and made a lewd gesture with your finger to her. Mrs. Smith caught up to you and asked for the letter. You turned toward her threateningly and yelled loudly "Fuck you lady"; you quickly repeated it three more times. You told her: "You ain't getting it lady. I'm late and I'm hot and tired and if you know what's good for you, you'll get the Hell away from

me." Mrs. Smith was extremely frightened by all of this and ran from you.

(A-325). Not too long after this episode, he engaged in another such outburst:

> On Friday, August 22, 1986 at approximately 1:45 pm. Mrs. E. Koschak, postal patron at 3854 Grant Avenue Philadelphia, PA asked you not to leave mail at two specified houses because the occupants had moved. Mrs. Koschak further advised you that someone may take the mail and you could get in trouble. You told Mrs. Koschak that once you 'put mail in the box you no longer care about it" and that she should 'sit on her ass' because you knew what to do. Mrs. Koshak's son overheard your comments and told you not to speak to his mother like that. At this time you made several statement perceived by Mrs. Koschak as 'smart' remarks to her son. Additionally, you made a gesture which was described by Mrs. Koschak as placing your 'hand on the private part of his body and shake it to her son.' She stated she was sitting near her son and grandson at the time.

(A-325). Mr. Pierce was the subject of disciplinary proceedings and based upon these incidents and his deteriorating attendance record, he was discharged from the Postal Service.

5. Evaluations Conducted at the Request of Habeas Counsel.

When undersigned counsel were appointed to represent Mr. Pierce, he continued to deny that he was mentally ill and refused undersigned counsels' requests that he submit to a mental health evaluation.[13] Faced with this dilemma, counsel provided the above-summarized records to two psychiatrists, Dr. Robert Sadoff and Dr. Larry Rotenberg. Based on these documents, each of these psychiatrists opined that Mr. Pierce was suffering from paranoid delusions and psychosis, and that the records raised questions about his competency to proceed in habeas and at the time of trial. Dr. Rotenberg stated:

> The question of whether he was competent to stand trial or whether he was criminally responsible at the time of the trial is certainly a major issue. . . Most certainly at this

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[13]Mr. Pierce agreed to counsels' suggestion that he undergo neuroimaging at the University of Pittsburgh Medical Center. Counsel offered this as an alternative to seeing a mental health expert. While eschewing mental health evaluations, Mr. Pierce was willing to undergo imaging because of his desire to find the transponder he believes was implanted in his brain. *See Petition*, at p. 30 n.5.

> point in time, he seems to be progressively more psychotic, more bizarre, and more paranoid.

July 21, 2002 Report from Dr. Rotenberg to counsel, A-515-527, at A526-527.

Dr. Sadoff stated the following:

> It is clear that there are questions of Mr. Pierce's mental state at the time of the commission of the act . . . and at the time of trial. What is tragic is that he is now appearing to be deteriorating on death row in prison. His communications appear to be delusional and he appears to have some hallucination regarding what is happening to him and his appearance in prison.

October 3, 2002 Report of Dr. Sadoff to counsel, A-528-531, at 531.

Counsel also presented the above-described documents to Alan Tepper, JD, Ph.D., a clinical psychologist, who had been retained in state post-conviction proceedings in 1997 by Mr. Pierce's then counsel, Bernard Siegel. As related in Dr. Tepper's report to undersigned counsel, Mr. Pierce refused to be evaluated at that time. However, based upon the records presented to Dr. Tepper by undersigned counsel, and Dr. Tepper's brief conversation with and observations of Mr. Pierce from 1997, Dr. Tepper found a "strong likelihood that Mr. Pierce was suffering from a severe mental illness that would affect his ability to control his powers of judgment and reasoning. . . [and his history] raises questions regarding Mr. Pierce's past competency to stand trial. . ."[14]

Although Mr. Pierce did not wish to be evaluated by a mental health professional, he was willing to be seen by a medical doctor in order to document his various medical complaints, including that guards were performing surgery on him, and to locate the transponder that he believes

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[14]Dr. Tepper's Report is not included in the Joint Appendix, however it was provided to the District Court as Attachment "B" to *Petition for Involuntary Commitment to a Forensic Psychiatric Facility* (District Court document # 30). It is included in *Petitioner's Supplemental Appendix* at SA-007-009 filed with the Court of Appeals.

is implanted in his brain. Undersigned counsel therefore engaged Dr. Robert Fox to conduct a medical examination of Mr. Pierce at the State Correctional Institution at Greene. Dr. Fox is a board certified psychiatrist, and as such he is also a medical doctor. Dr. Fox visited Mr. Pierce on August 23, 2002, introduced himself to Mr. Pierce as a medical doctor, and asked him to explain the nature of his physical complaints. As the following excerpts from Dr. Fox's subsequent report reveals, Mr. Pierce is deeply disturbed, delusional, psychotic, and certainly not competent:

> The interview lasted for about 2.5 hours during which time Mr. Pierce spoke freely. He required little prompting throughout the interview, and his speech was significantly pressured.
>
> He went on to describe in exact detail the way in which the guards had damaged his body, changed the way he looks, and sexually violated him. **He has created an elaborate and internally consistent delusional construct as to how these changes to his body and the sexual violation were accomplished.** He claims that the guards do these things to him while he is asleep. He believes that the guards have perfected a way to alter his appearance without leaving any physical trace that they had conducted these procedures. Included in the changes to his appearance that he described was the loss of his hair, and surgical changes to his nose and face.
>
> * * *
>
> He described how he believed these things were done to him. He believes they are done while he sleeps and he knows he has been drugged by the guards so they could do these things to him. He pointed to what he claimed were puncture wounds on his arms, which he claimed were evidence of the drugging. I saw no evidence of any such wounds (old or new) but he insisted that he sees them all the time. He also claimed that the guards can puncture his skin while he sleeps because he is being "heavily sedated through the air vent." He also described being poisoned through his food, which he can tell has been tampered with because it is often "slippery." He says that at times "the milk tastes like metal." He also went into a very long discourse as to how the toast that he was receiving had been contaminated because it was damp on one side or the other.
>
> While I obviously did not believe that he had been subjected to surgical procedures performed by the guards, throughout the interview I conducted physical examinations of the portions of this body that he claimed they were altering. So, for instance, I examined his hairline, nostrils, and arms. I saw no evidence that he had been subjected to any surgical procedures such as he described.

He also related an elaborate description of how he had been brainwashed while in prison, the culmination of which occurred at Huntingdon Prison. He told me that he had undergone an electroencephalogram during which a "radio transmitter" or "transponder" had been implanted in his brain. Following this implantation he began to hear a voice speaking to him. He said the first time that he heard it the voice said, "Hi, Mike. I know telepathy like you. I'm a genius, too." He indicates that he has been hearing this voice continuously since 1992 when the "transmitter was implanted."

He believes that he was under FBI surveillance while he lived in California in 1987 and 1988. During this period he drove a cab and indicates that he heard a different set of voices which he believed were those of federal agents watching him. He made a connection between those voices heard in California and the one he has heard since the early 1990s.

I tried repeatedly to get Mr. Pierce on track or to structure the interview. This was nearly impossible.

He finally related to me that the things that were being done to him were being done for a specific reason. He believes that the prison officials want him to look different from the way he really looks, and they want him to look like he was "crazy" so that nobody will take his complaints seriously. He is clearly convinced that he is an extremely powerful and important person meriting this special treatment at the hands of the authorities. He described how through mental telepathy he has been able to send information to the United States military to create new weapons in the war against terrorism.

Despite not performing a formal mental status examination in the course of discussion I was able to form some impressions and make a number of observations. . . . His thinking revealed paranoid and grandiose delusions as described above. His associations are significantly loosened. He described auditory hallucinations in great detail. Although his speech appeared to be logical and consistent on a superficial level, it is quite obvious that it is his **delusions** that are logical: that is, there are internal consistencies to his delusional thoughts.

Due to the obvious presentations of Mr. Pierce's pathology, I was able to form a number of psychiatric opinions to a reasonable degree of certainty. Mr. Pierce today is suffering from chronic Paranoid Schizophrenia. In addition, on the basis of his report of symptomatology, as well as evidence from background collateral sources, I can say with a reasonable degree of certainty that this paranoid psychosis has existed from at least as early as 1986 or 1987, and probably prior to that time. In addition, from the late 1970's through his incarceration in 1989, he has suffered from polysubstance dependence with particular use of alcohol, amphetamines and cocaine.

Excerpts from Declaration of Dr. Robert Fox, A-497–508.

Counsel provided Dr. Fox's report to Dr. Rotenberg, who issued a second report.[15] Dr. Rotenberg opined that the content of what Dr. Fox reported:

> is a manifestation of the increased severity of his illness and his continued deterioration. . . [A]ll of the delusions that he has, regarding his body being invaded, regarding being molested, regarding his food being poisoned, regarding transponders being implanted into him – all of these are manifestations of severe and unremitting psychosis.

Dr. Rotenberg likened Mr. Pierce's beliefs that people are not who they say they are to a variant of Capgras Syndrome:

> in which the individual becomes so psychotic, that he believes that people are not who they say they are, and believes that he is not who says he is, or as in this variant, that the time span and that the experiences within a time span, have somewhat been falsified for unknown and delusional purposes.

D. Undersigned Counsels' Application to the District Court for Involuntary Commitment.

Pursuant to the District Court's order, counsel filed a habeas petition on December 10, 2002. It contained a small number of claims that counsel could glean from the record, and those related to Mr. Pierce's obvious mental health deficits. However, counsel reported to the District Court that in their view, based upon all of the above summarized information, including the opinions of four mental health professionals, that Mr. Pierce was not competent to proceed. Counsel advised the District Court that the *Petition* therefore did not contain all potential claims, as counsel were frustrated in their investigative efforts because of Mr. Pierce's incompetency. They also advised the District Court that they would be moving for an involuntary sixty day commitment of Mr. Pierce for

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[15]Dr. Rotenberg's second report is not included in the *Joint Appendix*, but it too was attached to *Petition for Involuntary Commitment* (District Court document # 30) as Exhibit "A" and it is included in *Petitioner's Supplemental Appendix* at SA-010-012 filed with the Court of Appeals.

psychiatric diagnosis and treatment:

> Counsel have spent months attempting to break through Mr. Pierce's shroud of delusions, and his bizarre and highly tangential thinking. Counsel and their investigator has visited with Mr. Pierce at SCI – Greene for dozens of hours trying to discuss the facts of this case and his prior lawyers' representation of him.
>
> It is undersigned counsels' view that Mr. Pierce is currently not competent to litigate this case. Counsels' presentation therefore is limited to only the mental health claims that are supported by the above described records and opinions, and three other claims that are apparent from the record . Even then, counsels' mental health presentation has been severely handicapped by Mr. Pierce's ongoing inability to cooperate with counsel.
>
> Counsel respectfully believe that this Court must take steps to fully explore the extent of his illness. Counsel are at their end in this regard. They have done everything within their power and knowledge to obtain the cooperation of this very ill man to fully explore these issues. Counsel now needs the help of the Court. Petitioner should be committed to a secure prison hospital for a period of at least sixty days in order to determine the extent of his illness and to have him observed and evaluated by mental health professionals. Counsel will formally move for this relief in a separate filing. In the meantime, counsel present the following claims for relief based upon what they currently know.

See Petition at ¶¶ 44, 46, 47.

Shortly after filing the habeas petition, undersigned counsel filed a motion styled *Petition for Involuntary Commitment to a Forensic Psychiatric Facility for Long-Term Evaluation* (District Court document # 30). The Commonwealth filed written opposition to this motion, arguing, among other things, that the Court "must find out what Mr. Pierce wants to do" before considering a commitment. Commonwealth's *Response to Motion for Involuntary Commitment* (District Court document # 36) at 7. In a *Reply Memorandum* (District Court document # 38) at 11-14, undersigned counsel did not oppose the Commonwealth's request that the Court hear from Mr. Pierce, but made plain that Mr. Pierce denied that he was mentally ill and did not wish to be evaluated. Counsel offered to stipulate to these facts, and questioned the utility of hearing from him at that point. *See*

Petitioner's Reply to Respondents' Response Regarding Motion for Involuntary Commitment (District Court document # 38) at page 11 ("While counsel have no objection to this course, it is unnecessary because counsel already know what Michael Pierce wants to do: **he does not want to be evaluated and instead wants to litigate the claims that have percolated from his deluded mind.** In order to avoid the time and expense of hearing from this psychotic man, counsel will stipulate that Mr. Pierce currently does not wish to be evaluated.") (emphasis in original).

After considering the *Habeas Petition*, the request for *Involuntary Commitment* (along with the above records), and the fact that Mr. Pierce did not wish to be evaluated, the District Court found that "Petitioner might presently be incompetent and thus be unable to at present rationally assist counsel" (A-10) and ordered that Mr. Pierce be temporarily committed to determine whether he is mentally ill, suffers from paranoid schizophrenia, and is competent to proceed.

After reviewing the extensive documentation presented to the District Court and the state court record, the Court of Appeals concluded the Commonwealth's appeal did not fit within the narrow confines of an appealable collateral order and dismissed the appeal for lack of jurisdiction. In doing so, the Court stated: "[I]mportantly, the final judgment rule promotes efficient judicial administration by emphasizing the deference an appellate court owes to the district court's decisions on the many questions of law and fact that arise before judgment." Pierce, 467 F.3d at 369.

ARGUMENT

THE DISTRICT COURT'S ORDER GRANTING THE PETITION FOR INVOLUNTARY COMMITMENT TO ASSESS MR. PIERCE'S COMPETENCY WAS PROCEDURALLY SOUND, AND WAS NOT SUBJECT TO INTERLOCUTORY APPEAL.

The District Court had before it a "reasonably strong showing" that Pierce may be incompetent to rationally assist counsel. Pierce, 467 F.3d at 367. The District Court also knew that

Pierce would refuse to be evaluated and would continue to assert he was not mentally ill. The District Court invited the Commonwealth "[t]o identify a forensic psychiatrist to participate in an evaluation of Pierce's current competence to participate in his capital litigation." Id. at 368. The Commonwealth refused.[16] In light of the overwhelming evidence presented to the District Court concerning Mr. Pierce's inability to rationally assist habeas counsel, the court did not abuse its discretion in ordering that he be evaluated. Indeed, whether there is reasonable cause to believe that a criminal defendant is competent at the time of trial, is left to the discretion of the district court. United States v. Zhou, 428 F.3d 361, 381 (2d Cir. 2005); United States v. General, 278 F.3d 389, 396 (4th Cir 2002); United States v. Downs, 123 F.3d 637, 641 (7th Cir. 1997), Newfield v. United States, 565 F.2d 203. 206 (2d Cir. 1977). There should be no different rule in habeas corpus proceedings, where this Court has held that a district court has discretion to temporarily commit a state capital prisoner to a secure mental health facility to determine competency to proceed with a habeas corpus challenge to his conviction and death sentence. Rees v. Payton, 384 U.S. 312 (1966).

In Rees, this Court remanded a habeas case to the district court with directions to consider the competency of the habeas petitioner by, among other things, committing him to a secure facility for 60 days to determine his competence to make litigation decisions. See also Streetman v. Lynaugh, 835 F.2d 1521, 1525 (5th Cir. 1988) (Supreme Court "cite[d] for support by analogy the federal statutory provisions presently codified at 18 U.S.C. §§ 4241-4247 that authorize a federal district court in a federal criminal prosecution to order" such commitments when a defendant's competency to stand trial is at issue).

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[16] The Court of Appeals also noted that "[T]he Commonwealth cannot refuse to participate in the proceedings below and then expect the court of appeals to intervene. Cf. Cohen, 337 U.S. at 546 ("Appeal gives the upper court a power of review, not one of intervention").

As with trial competency, Rees affords the district court "a measure of discretion in determining the type and extent of procedures necessary to decide the issue of competency." Mata v. Johnson, 210 F.3d 324, 327 (5th Cir. 2000). See 18 U.S.C. § 4241(a) (a district court may order a temporary commitment if there is "reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent").

Nonetheless, the Commonwealth complains that the procedures employed by the District Court – relying on the state court record and voluminous documentary and written submissions to establish "reasonable cause"that Mr. Pierce may be incompetent and unable to rationally assist counsel – violated Mr. Pierce's right to due process and that the commitment order falls within the purview of Vitek v. Jones, 445 U.S. 480 (1980).

The Commonwealth is wrong. Mr. Pierce was not required to prove incompetence in order to secure an evaluation – he simply had to demonstrate reasonable cause to believe he was incompetent and unable to rationally assist counsel, which was done. Moreover, Vitek is readily distinguishable. The issue in Vitek concerned a determination by prison officials, pursuant to a state statute, that an inmate was mentally ill and could not receive proper treatment in the penal complex and thus was transferred to a mental hospital for treatment. Vitek, 445 U.S. at 484. Under the state statute at issue, the inmate could be transferred to a facility for "examination, study and treatment..." Id. at 483. This Court held "[N]one of our decisions holds that conviction for a crime entitles a State not only to confine the convicted person but also to determine that he has a mental illness and subject him involuntarily to institutional care in a mental hospital." Id. at 493.

In this case neither the District Court nor the Court of Appeals placed the stigmatizing label "mentally ill" on Mr. Pierce. Nor did the District Court commit him for involuntary treatment in a

mental hospital, as was the case in Vitek. The District Court, faced with a habeas petitioner who admittedly would not cooperate with a competency evaluation, and faced with "a reasonably strong showing that Pierce was acutely mentally ill," Pierce, 467 F.3d at 367, and unable to rationally assist counsel, properly exercised its discretion to have Mr. Pierce evaluated.

The Commonwealth also asserts that the District Court failed to appropriately "confront the rulings of the state court," *Petition* at 20, and presume the sole competency finding from 1989 negated the wealth of evidence presented to the District Court in 2002, which established reasonable cause to believe Mr. Pierce may be incompetent and unable to rationally assist current counsel. There is but one notation in the entire state court record concerning Mr. Pierce's competency. See NT 10/16/90, at 20 ("on 12/8/89, the defendant was found competent, and Mr. Wallace requested a continuance for further preparation"). There were not, as alleged by the Commonwealth, "numerous hearings and reviews," *Petition* at 15, concerning Mr. Pierce's competency. In fact, there were none. No litigation whatsoever took place in state court concerning Pierce's competency. A competency finding that is eighteen (18) years old and predicated only on a brief encounter with Mr. Pierce and a review of his pending charges is at best, stale. See Mata v. Johnson, 210 F.3d 324, 332 (5th Cir.2000) (district court erred when it based a finding of competency to waive further federal review on a twelve-year old finding where there was also evidence of recent irrational behavior).[17] More to the point, the 1989 evaluation was included in the material presented to the district court for its consideration in determining whether Mr. Pierce had established "reasonable cause" for a current competency evaluation.

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[17] See Report of Dr. Eric Becker (A-63) (noting that the "source of information" relied on was Petitioner's rap sheet). This evaluation is unreliable.

Thus, in view of the age of the "finding," the unreliability of the so-called evaluation, and the current evidence of Mr. Pierce's psychotic state and lack of capacity, neither the District Court, nor the Court of Appeals owe the 1989 competency finding deference such that standing alone, would preclude the District Court from making a contemporary inquiry into competency.

The cases relied upon by the Commonwealth to suggest that the Court of Appeals erred in concluding that the Commonwealth could not take an interlocutory appeal are distinguishable. As a general rule, a party to an action in federal court "is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of error at any stage of the litigation may be ventilated." Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994); 28 U.S.C. § 1291. Apart from certain statutorily enumerated exceptions that are inapplicable here, only a "small class" of interlocutory orders are immediately appealable through the "collateral order doctrine." Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

The Commonwealth maintains that a civil commitment order, or an order that results in the detention of a pre-trial defendant for an evaluation, who would otherwise be at liberty, fits within the Cohen exceptions. However, those instances are distinguishable from Mr. Pierce's case. What makes the order "important" and therefore subject to interlocutory appeal in the case relied upon by the Commonwealth, is the significant diminution in liberty resulting from the order. That diminution is missing in this case.

For instance, in United States v. Deters, 143 F.3d 577 (10th Cir. 1998), the defendant, who was pending trial and not incarcerated, was ordered by the district court to submit to an in-custody competency and sanity evaluation. Id. at 578. The Court framed the issue as "not whether there were grounds to conduct a psychiatric examination, but whether the defendant should have been **confined**

during the examination." Id. at 580. Under these circumstances, the Court held that the commitment order may be immediately appealed. Id. at 581.

Likewise, in United States v. Rinaldi, 351 F.3d 285 (7th Cir. 2003), upon filing a motion for reconsideration of the denial of his request to withdraw his plea of guilty due to the discovery that he suffered from Adult Attention Deficit Disorder, the court ordered a forty-five (45) day custodial examination to determine whether he did in fact suffer from a mental disease or defect at the time of the offense. Id. at 286. Not surprisingly, the Tenth Circuit concluded this order was immediately appealable because "[t]he order would be virtually unreviewable because there would be no effective relief for Rinaldi's loss of liberty during the period of commitment." Id. at 288.

In United States v. Davis, *93 F.3d 1286* (6th Cir. 1996), the Court concluded that the district court erred in ordering defendant, at the behest of the prosecution, involuntarily committed to assess her competency without first establishing "reasonable cause" to question her competency. Id. at 1290.

Finally, in United States v. Weissberger, *951 F.2d 392* (D.C. Cir. 1992), the Court upheld the propriety of an immediate appeal under the "collateral order doctrine" of an order "requiring confinement and psychiatric evaluation" Id. at 396, where the defendant challenged the Magistrate Judge's authority to issue such an order *sua sponte*. *Id.* at 395. The Court ultimately found the order for commitment and evaluation, under the facts of the case, proper.

None of these cases support the Commonwealth's novel proposition that the District Court's order moving Mr. Pierce from death row to a hospital is "important" enough to depart from the rule that a party should take an appeal at the end of the litigation. The District Court's conclusion that Mr. Pierce established "reasonable cause" to believe he may be incompetent and unable to rationally

assist current counsel, and its subsequent order for commitment for a competency evaluation given Pierce's historical recalcitrance to cooperate in such matters, fits within the collateral order doctrine.

Nor did the Court of Appeals take the cavalier attitude attributed to it by the Commonwealth that because Mr. Pierce is already incarcerated, traditional liberty concerns may not be at issue. Rather, the Court of Appeals concluded "[t]he Court's order...is a temporary measure to accomplish a specific and finite goal, that is evaluation, within the confines of custodial setting, and it is not clearly beyond the discretion of the District Court in aid of its jurisdiction." Pierce,467 F.3d at 373.[18]

Of course, there is something disturbing, if not perverse, in the Commonwealth standing up for the purported violation of Mr. Pierce's liberty interest. The Commonwealth, after all, is duty bound to defend the sentence of death and to execute Mr. Pierce. Obviously, the Federal Public Defenders appointed by the District Court to represent Mr. Pierce have his interests at heart, and are duty bound to advocate in his best interests. There is no due process issue here requiring immediate appellate review, except for the one that lives in the mind's eye of the Commonwealth.

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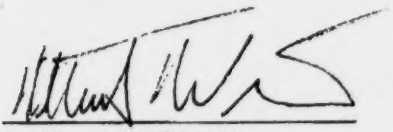
[18]The Court added that "[i]f Pierce is found to be competent after evaluation, then habeas counsel will be appropriately guided in regard to presenting 'his claims' to the District Court." *Id.*

CONCLUSION

For the reasons stated above, Mr. Pierce respectfully request that this Court deny the Commonwealth's *Petition for Writ of Certiorari.*

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2007, I served two copies of the above brief upon the following person by First Class Mail, postage prepaid:

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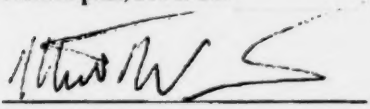

Michael Wiseman

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IN THE
SUPREME COURT OF THE UNITED STATES

CONNOR BLAINE, THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Petitioners

v.

MICHAEL PIERCE

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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II. Respondent's attorneys, like the court below, disregard the import of *Vitek* on the appealability issue.

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REPLY TO BRIEF IN OPPOSITION

I. The order below was not a "routine competency evaluation," as respondent's nominal counsel labors to characterize it, but a long-term, indefinite commitment to a prison psychiatric facility, which will subject the respondent to involuntary treatment as a mental patient – despite his insistent objections to such procedures and the repeated holdings of the state court that he is competent to understand the legal proceedings.

Respondent's current attorneys spend 25 out of their brief's 30 pages pleading "facts" that purport to show their client has been incompetent for the last twenty years, since before his trial. Relying primarily on prison records and defense-hired experts, the attorneys contend that respondent is delusional because he believes that prison guards have been assaulting him in bizarre ways, cutting his hair, and trying to poison him with prison food.

Of course counsel's representations ignore hundreds of pages in the records – as well as the conclusions of court-appointed experts and several of respondent's own prior lawyers – that run counter to incompetency. Nor do the allegations directly address respondent's ability to understand his legal position – which he has regularly and reasonably discussed on the record. And, most importantly, the assertions disregard the appraisal of the state judge who dealt with respondent, face to face, in numerous proceedings over the course of a decade -- a period coterminous with most of the attorneys' "evidence" of incompetence.

Be that as it may, however, the question before the Court is not whether respondent was incompetent to stand trial, or even whether he has subsequently become incompetent. The question is how to adjudicate the newly presented *claim* that respondent is and was incompetent. To the lower courts, the appropriate first step was to clap him into a prison psychiatric facility for (in the district court's own terms) a "long-term" "commitment."

That was wrong. What should have happened first was a hearing, at which the central subject, in the person of respondent himself, could have appeared and spoken on his own behalf, as he did in state court. His current lawyers, who were appointed on habeas review over respondent's objection, were free to seek intervention through a "next friend"; they are quite familiar with that procedure.[1] That would have left the court able to appoint respondent his own lawyer, one who would have represented the expressed desires of his client. Perhaps under such circumstances, and on the neutral ground of a federal courthouse, respondent might even have agreed to meet with a psychiatrist or psychologist. At the least, the district court would have had the benefit of hearing at least once from the most crucial witness.

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[1] *See, e.g., White v. Horn (In re Heidnik)*, 112 F.3d 105 (3rd Cir. 1997); *In re Moser*, 69 F.3d 691 (3rd Cir. 1995); *Devetsco v. Horn (In re Zettlemoyer)*, 53 F.3d 24 (3rd Cir. 1995); *Michael v. Horn*, 2004 U.S. Dist. LEXIS 3702 (M.D. Pa. 2004); *Commonwealth v. Saranchak*, 866 A.2d 292 (Pa. 2005); *Commonwealth v. Haag*, 809 A.2d 271 (Pa. 2002); *Commonwealth v. Bronshtein*, 792 A.2d 1102 (Pa. 1999); *see also Commonwealth v. Zook*, 887 A.2d 1218 (Pa. 2005).

What should not have happened was the Queen-of-Hearts approach employed below: commitment first, hearing after. Respondent's lawyers say that this commitment order amounted merely to "a routine competency evaluation," during which respondent would be subjected to nothing more intrusive than "observation." Brief in Opposition at 1. But then why even bother? Respondent has been under observation by prison mental health professionals, by prior counsel, and by the courts, for the better part of two decades. Indeed the reports already generated during this period provide the materials from which all the current allegations of incompetence have been selected.

Clearly, the open-ended commitment ordered by the district court will result in something considerably more onerous than just another "observation." The whole point of an involuntary commitment, after all, is to subject the individual to psychiatric intervention against his will. In respondent's case, he will be transferred from his current setting to a facility such as the State Correctional Institution at Waymart.[2] Waymart is a former state mental hospital now operated by the Pennsylvania Department of Corrections as its "Forensic Treatment Unit." While the department provides a full hierarchy of psychological services, Waymart is at the top of the scale. There respondent will be housed for some indefinite period with the most disturbed inmates in the state prison system. He will be subject to institutional protocols for inpatient psychiatric care and treatment. If, as his attorneys contend, respondent has

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[2] http://www.cor.state.pa.us/waymart/site/default.asp.

had delusional feelings of persecution by prison personnel, his long-term commitment is sure to confirm them.

Respondent's attorneys, citing *Rees v. Peyton*, 384 U.S. 312 (1966), insist that this Court has already authorized such pre-hearing commitments whenever defense lawyers claim the incompetence of their clients. But *Rees* was decided fourteen years before the Court established that even prisoners have rights against involuntary psychiatric commitments. *Vitek v. Jones*, 445 U.S. 480 (1980). And there was no indication in *Rees* that the defendant would be committed indefinitely, without even a review process (like respondent here); or that he had repeatedly sought his attorneys' removal and steadfastly opposed their mental illness strategy (like respondent here); or that the state courts had specifically considered his capacity to make such decisions and found him competent to do so (like respondent here).

By consigning respondent to a long-term psychiatric commitment, without even notice or hearing, the lower courts went far beyond a mere competency exam. Instead they effectively reversed respondent's presumption of competence, endorsed the attorneys' mental case strategy, and undermined the state court's determinations.

II. Respondent's attorneys, like the court below, disregard the import of *Vitek* on the appealability issue.

Respondent's attorneys spend the bulk of their appealability argument attempting to contrast this case with cases where defendants who were not already in jail were ordered committed for psychiatric care. Those cases presented an "important" question meriting interlocutory appeal, say the attorneys, because there was a diminution of liberty.

The attorneys never, however, address the impact of *Vitek*. The whole point of that decision is that involuntary psychiatric commitment represents a constitutionally significant diminution of liberty even if the defendant was already incarcerated. Accordingly, such a commitment is appealable under the collateral order doctrine, as at least one federal circuit has held. *United States v. Visinaiz*, 96 Fed. Appx. 594 (10th Cir. 2004) (unpublished).

Absent an argument on this point, respondent's attorneys instead attack the Commonwealth's standing here. They maintain that the Commonwealth just wants "to execute Mr. Pierce," and therefore cannot represent him. But the Commonwealth does not purport to represent respondent. As a party to this habeas proceeding, the Commonwealth is independently affected by the commitment order, which indefinitely delayed the proceedings and disregarded years of state court competency proceedings.

Left unanswered, however, is whether anyone is really representing respondent. The attorneys insist that they must be presumed to "have his interests at heart." But

why? Obviously respondent does not think so; and he is, still, deemed competent. The lawyers are undoubtedly better equipped than he to devise successful legal claims. But that is not the test.

Thus the important questions presented by this case: how should courts process an attorney's request for the long-term involuntary commitment of his habeas client? And (as the attorneys' standing argument would suggest) are the answers different where the sentence in question is death?

CONCLUSION

For the reasons set forth above and in the petition for certiorari, petitioners respectfully request that a writ of *certiorari* issue to review the decision below.

Respectfully submitted,

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